(33,759)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 450

MORRIS & COMPANY ET AL., PETITIONERS,

vs.

SKANDINAVIA INSURANCE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 21, 1928

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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DIVISION OF THE SOUTHERN DISTRICT OF MISSISSIPPI.

PLEAS AND PROCEEDINGS had and done at an adjourned term of the District Court of the United States for the Southern Division of the Southern District of Mississippi, on September 9, 1927, that being the time and place designated in said order of adjournment.

Present and Presiding the Hon. E. R. Holmes, United States District Judge.

Among the proceedings had and done were the following, to wit:

3 CAPTION.

The State of Mississippi,
Harrison County.

BE IT REMEMBERED that a regular term of the Circuit Court of Harrison County, Mississippi, was begun and held at and in the Court-house of said County and State, in the city of Gulfport, in said County and State, on the second Monday of October, A. D. 1925, being the 12th. day of October, A. D. 1925, the same being the time and place designated by law for holding said term of said Court.

There were present and in attendance upon said Court the Honorable W. A. White, Judge of the Second Judicial Circuit Court District of the State of Mississippi, herein solely presiding; B. F. Duckworth, Sheriff of said Harrison County, Mississippi; A. J. Ramsay, Clerk of said Court; and Robert L. Murphy, Official Court Stenographer for said Circuit Court District.

October Term, 1925.
October 12, 1925.

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4 DECLARATION.

IN CIRCUIT COURT, OCTOBER TERM, 1925.

State of Mississippi,
Harrison County,

MORRIS & COMPANY, A CORPORATION,
Plaintiff,

versus No. ....

SKANDINAVIA INSURANCE COMPANY, LTD., A CORPORATION OF COPENHAGEN, DENMARK,
Defendant.

Plaintiff, Morris & Company, a corporation organized and existing under the laws of the state of Louisiana, by attorneys, complains of the defendant, Skandinavia Insurance Company, Limited, a corporation organized and existing under the laws of the Kingdom of Denmark,

with its home office in the city of Copenhagen, and which is doing business in the state of Mississippi, under the laws thereof, in a plea of trespass on the case:

For that, whereas, heretofore, to-wit: on the 11th day of July, 1918, and prior and subsequent thereto, the defendant was and is engaged in the business of marine insurance, insuring vessels and their cargoes against various losses, for hire, and had a branch agency in the city of Buenos Aires, Argentine Republic.

That, on, prior and subsequent to said 11th day of July, 1918, the plaintiff, Morris & Company, was and is engaged in the business of packer and exporter of meats used for human food, for commercial purposes, doing business in the United States and in various foreign countries, and having an office and branch in the city of Havana, Cuba.

That, on May 20, 1918, there was issued to the said plaintiff, Morris & Company, by the master of the vessel Normandy, in the port of Montevideo, Uraguay, a bill of lading on Four Thousand Three Hundred Eleven (4311) barrels of jerked beef belonging to plaintiff, to be carried by said vessel for the plaintiff to the port of Havana, Cuba.

That, on the 11th day of July, 1918, the defendant insurance company issued to plaintiff a policy of insurance in the sum of Fifty Thousand Dollars, United States gold, covering and insuring said jerked beef belonging to plaintiff on said vessel, and, by the terms of said policy, did insure plaintiff against loss of said meat by any of the perils mentioned in said policy to the extent

of Fifty Thousand Dollars ($50,000), a copy of which said policy is hereto attached and prayed to be made a part of this declaration, as Exhibit "A" hereto.

That, thereafter, and on, to-wit: May 23, 1919, and solely because of perils insured against under the said policy as referred to above, the said consignment of Four Thousand Three Hundred Eleven (4311) barrels of jerked beef insured by the defendant became a total loss, and, under the terms of said policy, the defendant
6 thereby became liable to pay the plaintiff the full amount of said policy.

That the plaintiff at all times complied with the terms of said policy as to the payment of the premium thereon and in all other respects, and said policy on said jerked beef was in full force and effect when said jerked beef so insured by defendant became a total loss solely by reason of perils insured against by said policy.

Plaintiff avers that, on the 23d day of May, 1919, at the said port of Montevideo, Uraguay, the said vessel Normandy and her cargo were destroyed by fire; and that by the total loss of said 4311 barrels of jerked beef belonging to plaintiff, solely because of perils insured against by defendant under the said policy aforesaid on said jerked beef, the defendant became liable to plaintiff, Morris & Company, in the sum of $50,000, United States gold, under said policy.

That the plaintiff has made repeated demands upon the defendant insurance company for said sum so due it under the terms of said policy by its loss, yet the said defendant has wholly failed and refused and still fails and refuses to pay said sum so due under said policy and loss covered thereby, and no part of same has been paid;

and said defendant Skandinavia Insurance Company, is thereby now indebted to the plaintiff in the sum of
7 $50,000., United States gold, for said loss, with interest thereon at six per cent. per annum from the 23d day of May, 1919, until paid.

Wherefore, plaintiff sues, and demands judgment against defendant in said sum of $50,000., principal, and six per cent. interest thereon from May 23, 1919, until paid.

MIZE & MIZE,
Attorneys for Plaintiff.

EXHIBIT "A" TO DECLARATION.

COPY

"Skandinavia" Reinsurance Company Limited
General Agency Buenos Aires.

Head Office
Copenhagen (Denmark)

Capital
Crowns: 10,000,000

Galeria General Guemes.
A. Johnston
General Agent for South America

Direct Marine Insurances.

Policy No. 2612 Sum insured $50,000 U. S. Gold.

Whereas it hath been proposed to "Skandinavia" Reinsurance Company Limited by .... Messrs. Morris &

Company ..... as well in their ..... own name as for and in the name and names of all and every other person or persons to whom the subject matter of this policy does, may or shall appertain in part or in all to make with the said Company the Insurance hereinafter mentioned and described. Now this Witnesseth that in consideration of the said person effecting this Policy promising to pay to the said Company the sum of ..... as a Premium at
s and after the rate of nine per cent .... percent for such Insurance of the said Company takes upon itself the burthen of such Insurance to the amount of Fifty Thousand Dollars United States Gold, and promises and agrees with the Insured, their Executors, Administrators and Assigns in all respects truly to perform and fulfil the Contract contained in this policy. And it is hereby agreed and declared that the said Insurance shall be and is an Insurance (lost or not lost) at and from Montevideo to Cuba. And it is also agreed and declared that the subject matter of this Policy as between the Insured and the Company so far as concerns this Policy shall be had is as follows upon ... jerked beef, valued at $200,000 U. S. Gold, in the Ship or Vessel called the S. V "Normandy" .... whereof .... is at present Master of whoever shall go for master in the Ship or Vessel, Including all risk of Craft of Lighter to be considered as if separately insured.

To conform with the Revenue Law of Great Britain this Policy is required to be stamped within ten days after its receipt in the United Kingdom.

Goods carried on deck warranted free of all average.

Grounding in the River Plate and or tributaries thereof not to be considered stranding, but underwriters to pay for any damages directly resulting therefrom.

General average salvage and special charges payable if required as per Foreign Statement or as per York-Antwerp Rules 1890 if in accordance with the contract of Affreightment.

Conditions: Free from particular average unless the vessel or craft be stranded, sunk or burnt.

Claims payable in Buenos Aires, by "Skandinavia" Insurance Company. In the event of loss or damage for which the Company is presumed to be liable immediate notice must be given to Mr. Aquiliso Ordonez, 76 and 78 Cuba, Str. Havens.

And the said Company promises and agree that the Insurance aforesaid shall commence from the time when the Goods and Merchandise shall be laden on board the said ship or Vessel, Craft or Boat as above and continue until the said Goods and Merchandise be discharged and safely landed at as above. And that it shall be lawful for the said Ship or Vessel in the voyage so insured as aforesaid to proceed and sail to and touch and stay at any Ports or Places whatsoever without prejudice to this Insurance. And touching the Adventures and Perils which the said Company is contented to bear
9 and does take upon itself in the voyage so insured as aforesaid they are of the Seans, Men-of-War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Counter Mart, Surprisals, takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and People of what nation, condition or quality soever Barratry of the Master and Mariners and of all other perils, losses and misfortunes that have or shall come to the Hurt, Detriment or Damage of the aforesaid subject matter of this Insurance or any part thereof. And in case of any loss or

misfortune it shall be lawful to the Insured, their factors, Servants and Assigns, to sue, labor and travel for, in and about the Defense, Safeguard and Recovery of the aforesaid subject matter of this Insurance or any part thereof without prejudice to this Insurance the charges whereof the said Company will bear in proportion to the sum hereby Insured. And it is expressly declared and agreed that the acts of the Insurer or Insured in Recovering, Saving or preserving of the Property insured shall not be considered a waiver or acceptance of abandonment.

The Holders of this policy are likewise requested not to sign a general average bond nor to pay a general average deposit without having previously obtained the consent of the above mentioned Agents.

Warranted free of loss or damage caused by strikes locked-out workmen or persons taking part in labour disturbances or riots or civil commotions. Unless otherwise stated hereon in writing, Goods and or Merchandise are warranted free from particular average unless the Vessel or Craft be stranded, sunk or burnt ..... Underwriters, notwithstanding this warranty to pay for any damage or loss caused by collision, with any other Ship or Craft, and any special charge for warehouse rent, re-shipping or forwarding, for which they would otherwise be liable. Also to pay the insured value of any package or packages which may be totally lost in transhipment. ..... "Warranted free of capture, seizure, arrest, restraint or detainment, and the consequence thereof or of any attempt thereat (piracy excepted), and also all consequences or hostilities or warlike operations whether before or after declaration of war.

In witness whereof the undersigned on behalf of the said Company has hereunto set his hand in Buenos Aires the eleventh ..... day of July, 1918.

For "Skandinavia" Reinsurance Company, Limited.
May 18th, 1922.

Indorsements on back of Declaration and Exhibit "A":
No. 7975 Morris & Company vs. Skandinavia Insurance Company, Limited.

Declaration: Filed April 16, 1925. A. J. Ramsay, Clerk. By E. G. Lindsey, D. C. Mize & Mize, Attorney for Plaintiff.

11 SUMMONS.

The State of Mississippi,
Harrison County.
To the Sheriff of Hinds County—Greeting:

We command you, hereby, that you summon Skandinavia Insurance Company, Limited, a Corporation of Copenhagen, Denmark, defendant, if to be found in your County, so that it be before the Circuit Court, to be holden in and for the County of Harrison, at the Courthouse thereof, in Gulfport, in said County State aforesaid, on the second Monday of October, A. D. 1925, to answer the Declaration of Morris & Company, a Corporation, plaintiff, against said defendant, now on file in the Clerk's office of said Court. And have you then and there this summons.

Witness A. J. Ramsay, Clerk of said Court, by his signature, and also the Seal of said Court, affixed at his office in Gulfport.

Issued the 16th day of April, A. D. 1925.
(Seal) A. J. RAMSAY, Clerk.
By E. G. LINDSEY, D. C.

The Declaration on file is founded on an action of debt. The amount demanded in this suit is the sum stated in said Declaration—Fifty Thousand Dollars and lawful interests and costs. Judgment will be demanded at Return Term. Declaration filed when summons issued.
(Seal) A. J. RAMSAY, Clerk,
By E. G. LINDSEY, D. C.
MIZE & MIZE, (Gulfport, Miss.)
Attorneys for Plaintiff.

12 Sheriff's Return.

Received in office this 17 day of April, 1925.
W. S. WELLS, Sheriff,
By W. A. SANDEL, D. S.

I have this day executed the within writ personally on the within named defendant, Skandinavia Insurance Company, Ltd., of Copenhagen, Denmark, by delivering a true copy of said writ to T. M. Henry, Insurance Commissioner for the State of Mississippi and Attorney for Process for the said non-resident defendant, this the 17 day of April, 1925.
W. S. WELLS, Sheriff,
By W. A. SANDEL, D. S.

Indorsements on back of Summons: No. 7975 Circuit Court Harrison County, Miss. Morris & Company vs. Summons Skandinavia Insurance Company, Limited. To be served upon Insurance Commissioner. Term, October, 1925. Issued April 16th, 1925. A. J. Ramsay, Clerk.

Returned and filed April 20, 1925. A. J. Ramsay, Clerk.

13 CERTIFICATE OF MAILING COPY OF SUMMONS.

The State of Mississippi,
Harrison County.

I, A. J. Ramsay, Clerk of the Circuit Court of said County and State, hereby certify that I have on this, the 16th day of April, 1925, mailed as required by law, a true copy of the Original Summons or process issued in cause No. 7975, styled, Morris & Company vs. Skandinavia Insurance Company, Ltd., addressed to defendant as follows:

"Skandinavia Insurance Company, Limited,
Copenhagen, Kingdom of Denmark."

Given under my hand and official seal of office, this, the 16th day of April, 1925.

(Seal) A. J. RAMSAY, Clerk Circuit Court, Harrison County, Mississippi.
By E. G. LINDSEY, D. C.

U. S. Registry Receipt No. 7042, dated April 16, 1925.
Filed April 16, 1925.

A. J. RAMSAY, Clerk.
By E. G. LINDSEY, D. C.

14 COPY OF SUMMONS SERVED ON INSURANCE COMMISSIONER.

I, T. M. Henry, Insurance Commissioner of the State of Mississippi, do certify that the following is a true and correct copy of the summons this day served on me as

Attorney for Service, by the Sheriff of Hinds County, Mississippi, at my office in the City of Jackson, at 2.00 o'clock, P. M.

Given under my hand and signature this 17th day April, 1925.

(Seal) T. M. HENRY, Insurance Commissioner and Attorney for Service.

The State of Mississippi,
Harrison County.
To the Sheriff of Hinds County—Greeting:

We command you, hereby, that you summon Skandinavia Insurance Company, Limited, a Corporation of Copenhagen, Denmark, defendant if to be found in your county, so that it be before the Circuit Court to be holden in and for the County of Harrison, at the Court House thereof, in Gulfport, in said County, State aforesaid, on the second Monday of October, A. D. 1925, to answer the Declaration of Morris & Company, a Corporation, plaintiff, against said defendant, now on file in the Clerk's office of said Court. And have you then and there this summons.

Witness A. J. Ramsay, Clerk of said Court, by his signature, and also the Seal of said Court, affixed at his office in Gulfport.

Issued the 16th day of April, A. D. 1925.

A. J. RAMSAY, Clerk,
By E. G. LINDSEY, D. C.

The Declaration on file is founded on an action of debt. The amount in this suit is the sum stated in said Declara-

tion—Fifty Thousand Dollars and lawful interests and costs. Judgment will be demanded at Return Term. Declaration filed when summons issued.

A. J. RAMSAY, Clerk,
15 By E. G. LINDSEY, D. C.
MIZE & MIZE (Gulfport, Miss.),
Attorneys for Plaintiff.

A true copy of the original summons, as I hereby certify, this April 16, 1925.

Filed April 20, 1925.

A. J. RAMSAY, Clerk.

16 MOTION AND AFFIDAVIT FOR COSTS.

October Term, 1925.

Morris & Company
vs. No. 7975
Skandinavia Insurance Co., a Corpn.

Comes the Clerk of this Court and moves the Court to require the plaintiff herein to give security for costs, as per affidavit on file herewith.

A. J. RAMSAY, Circuit Clerk,
By E. G. LINDSEY, D. C.

In the Circuit Court

State of Mississippi,
Harrison County.

Morris & Company
vs.
Skandinavia Insurance Co., a Corpn.

Personally appeared before me, the undersigned authority in and for the said County and State, the Clerk of the Circuit Court of said County and State, who, being by me first fule sworn, deposes and says that the Plaintiff in the above styled cause is a non-resident of this State, and has not, as he believes, sufficient property in this State out of which the costs in this cause can be made if adjudged against it, and that this affidavit is not made at the instance of the defendant.

A. J. RAMSAY, Clerk of the Cir-
17 cuit Court.
By E. G. LINDSEY, D. C.

Sworn to and subscribed before me this the 25th day of September, 1925.

(Seal) EUSTIS McMANUS, Clerk of the Chancery Court.
By CHAS. HEWES, D. C.

Filed September 25, 1925.

A. J. RAMSAY, Clerk.
By E. G. LINDSEY, D. C.

18 ORDER SUSTAINING MOTION FOR COSTS.

Morris & Company
vs. No. 7975
Skandinavia Insurance Company, Ltd.

The Motion of the Clerk of this Court to require the plaintiff herein to give security for costs, being heard and considered by the Court, is by the Court sustained.

October Term, 1925.
October 12, 1925.

19 NOTICE OF INTENTION TO REMOVE CAUSE TO U. S. DISTRICT COURT.

In the Circuit Court. October Term, 1925.

State of Mississippi.
Harrison County.

Morris & Company, a Corporation, plaintiff,
vs.
Skandinavia Insurance Company, Limited, a Corporation of Copenhagen, Denmark, defendant.

To the above named Morris & Company, plaintiff, and Messrs. Mize & Mize, its Attorneys of Record:

You and each of you will please take notice that on the 8th day of October, 1925, at the hour of 9 o'clock, A. M., the above named defendant, the Skandinavia Insurance Company, Limited, will file in the above entitled Court the said defendant's petition and bond as required

by law for the removal of the said cause from the said above entitled Court to the District Court of the United States for the Southern Division of the Southern District of Mississippi. Copies of the said petition and bond are attached hereto. Upon the filing of the said petition and bond, or as soon thereafter as defendant can be heard defendant will call to the attention of the said Circuit Court of Harrison County, Mississippi, the said petition and bond and will move the said Circuit Court
20 of Harrison County, Mississippi, for an order of removal of the said action from the said Circuit Court of Harrison County, Mississippi, to the said District Court of the United States for the Southern Division of the Southern District of Mississippi, upon the grounds as stated in the said petition and upon the said petition and bond so filed and presented.

PILLANS, CAWLEY & GRESHAM,
LEATHERS & SYKES, by SYKES,
Attorneys for Defendant.

Service of the foregoing is acknowledged, and we also acknowledge receipt of a copy thereof this 7 day of October, 1925.

Copy received, October 7, 1925.

MIZE & MIZE.

Filed October 8, 1925.

A. J. RAMSAY, Clerk,
By E. G. LINDSEY, D. C.

21 PETITION FOR REMOVAL TO U. S. DISTRICT COURT.

In the Circuit Court, October Term, 1925.

State of Mississippi,
Harrison County.

Morris & Company, a Corporation, plaintiff,
vs.
Skandinavia Insurance Company, Limited, a corporation of Copenhagen, Denmark, defendant.

To the Honorable Circuit Court of Harrison County, Mississippi:

Your petitioner, the said Skandinavia Insurance Company, Limited, respectfully shows unto this Honorable Court that the matter and amount in dispute in the above entitled suit exceeds the sum or value of three thousand dollars, exclusive of interest and costs; and that the controversy in said suit is, and at the time of the commencement of the suit was, between a citizen of one of the States of the United States and a foreign citizen or subject, in this: That your petitioner, the defendant in the above styled suit, was at the time of the commencement of the said suit and still is a corporation organized under the laws of and a resident of and a citizen of the Kingdom of Denmark; and that said plaintiff corporation, in the said above styled suit, was at the time of the commencement of this suit and still is, a corporation organized under the laws of and a resident of and a citizen of the State of Louisiana in the United States of America.

And your petitioner offers herewith a good and sufficient surety for your petitioner's entering in the District

Court of the United States for the Southern
22 Division of the Southern District of Mississippi,
within thirty days from the date of the filing
of this petition, a certified copy of the record of the said above styled suit, and for paying all costs that may be awarded by the said District Court should hold that this suit was wrongfully or improperly removed thereto.

And your petitioner respectfully prays this Honorable Court to proceed no further herein except to make the order of removal required by law and to accept the said surety and bond and cause the record herein to be removed into the said District Court of the United States in and for the Southern Division of the Southern District of Mississippi.

And your petitioner will ever pray &c.

SKANDINAVIA INSURANCE COMPANY, LIMITED.

(Seal)

By Wm. H. McGEE & C., Managers
U. S. Marine Dept.
Its H. JACKSON, Vice President

State of New York,
County of New York.

Before me, the undersigned officer authorized to administer oaths, this day personally came and appeared H. Jackson, who, being by me first duly sworn, on oath doth depose and say as follows:

I am Vice-President of Wm. H. McGee & Co., Managers U. S. Marine Dept., for the Skandinavia Insurance Company, Limited, and as such am authorized to sign the foregoing petition for and on behalf of and as
23 the act of my of my said principal and I am authorized to make this verification thereof;

and I do on oath say that the matters and facts stated in the foregoing petition are true.

H. JACKSON.

Subscribed and sworn to before me this 11th day of September, A. D. 1925.

(Seal) DENNIS B. RYAN, Notary Public, New York County Clerk's No. 362, New York County Register's No. 6302, Commission expires March 30, 1926.

POWER OF ATTORNEY OF WM. H. McGEE & COMPANY.

State of New York,
County of New York,

Before me, the undersigned officer authorized to administer oaths this day personally came and appeared H. Jackson, who, being by me first duly sworn, on oath doth depose and say as follows:

I am vice-president of Wm. H. McGee & Co., Managers United States Marine Department for the Skandinavia Insurance Company, Limited, and hereby certify that the papers attached to and made a part of this affidavit are true and correct copies of the powers of attorney given to Wm. H. McGee & Co., by the Skandinavia
24 Insurance Company, Limited.

H. JACKSON.

Subscribed and sworn to before me this 11th day of September, A. D. 1925.

(Seal) DENNIS B. RYAN, Notary Public, New York County Clerk's No. 362, New York County Register's No. 6302, Commission Expires March 30, 1926.

AMENDMENT OF POWER OF ATTORNEY TO WILLIAM H. McGEE AND COMPANY.

Know all men by these presents, that I, Summer Ballard, by virtue of the power and authority given to me in and by a letter of attorney of the Skandinavia Insurance Company, Limited, of Copenhagen, Denmark, on September 1st, 1916, do hereby amend, modify and limit the authority given by me to William H. McGee & Company in a certain power of attorney dated November 13th, 1916, to represent the said Skandinavia Insurance Company in the United States as General Agents, Attorneys and Substitutes in all matters pertaining to marine insurance and marine reinsurance.

The said power of attorney to William H. McGee & Company is hereby amended, modified and limited so that the said William H. McGee & Company shall have and retain all power and authority granted thereunder except the power and authority to issue new insurances or reinsurances for and or bind the said company on new commitments which specifically excepted power and authority is hereby revoked and canceled on and after April 1st, 1923.

In witness whereof, I have hereunto subscribed my name and affixed the seal of the company at the City of New York this 26th day of March, 1923.

SUMMER BALLARD,
U. S. Manager.
DANIEL F. GNOM, Witness.

APPOINTMENT OF ATTORNEY.

Know all men by these presents that I, Summer Ballard, by virtue of the power and authority to me given in and by a letter of attorney of the Skandinavia Insurance Company, dated Copenhagen, Denmark, September 1, 1916, a certified copy of which is hereto attached, do hereby make, substitute and appoint William H. McGee & Company, of New York as General Agents, Attorney and Substitute in all matters pertaining to marine insurance and marine reinsurance business of the said Skandinavia Reinsurance Company named in the said letter of attorney, in and for the United States of America, with full power to conduct for the Company all such business of marine insurance and marine reinsurance in the State of New York and elsewhere in all the several States of the United States, as Marine Insurance and Marine Reinsurance Companies are permitted to transact under the Insurance Laws of the State of New York and such other States of the United States.

26 And further, the said William H. McGee & Company, so appointed General Agents, Attorneys and Substitutes shall have full power and authority to execute and sign all such statements or other documents or agreements of and relating to the Company's

business in the United States or any State thereof, as may at any time or times be required by the laws of any such State; and also to grant, execute and sign in the name of the Company all certificates, contracts of Marine Insurance and Marine Reinsurance, addendums to such, or other documents, including appointments of Attorneys for the service of legal process; to receive for and on behalf of the Company any money due it and to make any payments due by it; to settle and negotiate all claims resulting from such contracts of Marine Insurance and Reinsurance; to collect and collate returns for the annual Statements to be filed with the various Insurance Departments; and also to appear before all Courts and officers and tribunals and make acknowledgments of all such documents as they shall execute by virtue hereof, as and for the act and deed (or acts and deeds) of the said company.

And further, the said William H. McGee & Company, as General Agents, Attorneys and Substitutes, may engage and dismiss the necessary staff, designate and appoint one or more persons, firms or corporations as their assistants or substitutes to do and perform the several acts, matters and things hereinbefore specified, or any of them with the same force and effect as though done by them.

27 This appointment is to continue in force until a revocation of same shall be filed in the Insurance Department of the State of New York, duly executed by me or my successor as United States Manager of said Company.

In witness whereof I have hereunto subscribed my name and affixed the seal of the company at the City of New York, this 13th day of November, 1916.

SUMMER BALLARD.

APPOINTMENT OF ATTORNEY.

Know all men by these presents: that the Skandinavia Reinsurance Company, a corporation formed and existing under the laws of the Kingdom of Denmark and fully authorized to conduct business of Fire and Marine Insurance and Reinsurance within the said Kingdom and elsewhere, has constituted, and by these presents does constitute and appoint Summer Ballard of New York its Resident Manager and Attorney in and for the United States of America, with full power to conduct for the Company all such business of Fire and Marine Insurance and Reinsurance in the State of New York and elsewhere in all the several states of the United States, as Fire and Marine Insurance and Reinsurance Companies are permitted to transact under the Insurance Laws of the State of New York and such other States of the United States, and generally to do all acts and deeds appertaining to the affairs and operations of said Company in the United States in as full and complete a manner as the said Company is authorized by its Charter, or acts of incorporation or otherwise however to do.

And further, the said Summer Ballard so appointed Resident Manager and Attorney shall have full power and authority to execute and sign all such Statements or other documents or agreements of and relating to the Company's business in the United States or any State thereof, as may at any time or times be required by the laws of any such State; and also to grant, execute and sign in the name of the Company all certificates, contracts of Fire and Marine Insurance and Reinsurance,

addendums to such, agreement for the rent of offices, or other documents, including appointments of Attorneys for the service of legal process; to receive for and on behalf of the Company any money due it and to make any payments due by it; to settle and negotiate all claims resulting from such contracts of Fire and Marine Insurance and Reinsurance; to collect and collate returns for the annual Statements to be filed with the various Insurance Departments; and also to appear before all Courts and officers and tribunals, and make acknowledgments of all such documents as they shall execute by virtue hereof, as and for the act and deed (or acts and deeds) of the said Company.

29 And further, the said Summer Ballard as Resident Manager and Attorney, may engage and dismiss the necessary staff, designate and appoint one or more persons, firms or corporations as his assistants or substitutes to do and perform the several acts, matters and things hereinbefore specified, or any of them with the same force and effect as though done by him.

This appointment is to continue in force until a revocation of same shall be filed in the Insurance Department of the State of New York, duly executed by the officers of said Company under its corporate seal.

In witness whereof, the said Skandinavia Reinsurance Company has to these presents affixed its corporate seal and caused the name to be subscribed by its President of the Board of Directors Carl Winther Esq., and General Manager Carl Frederick Wilhelm Witzke Esq., at Cop

enhagen, Denmark, on the first day of September, One Thousand Nine Hundred and Sixteen.

GENFORSIKRINGS-
AKTIESELSKASET
"SKANDINAVIA"
(Seal) Direktionen.
CARL WINTHER, Esq.,
President.
WITZKE, General Manager.

Canceled I. R. Stamp, Kingdom of Denmark.

On this 1st day of September in the year of our Lord One thousand nine hundred and sixteen: Before the undersigned Charles Otto Moltved, Sub-notary in and for this city and Royal Residence of Copenhagen, personally came and appeared Messrs. Carl Winther and Carl Frederick Wilhelm Witzke, well known to me, and did with their own hand on behalf of the joint stock Company "Genforsikrings Aktieselskabet Skandinavia" in my presence duly sign the foregoing appointment of attorney, the contents of which they ratified, asserting to be fully acquainted with the tenor of the same, according to the registers of commercial firms and societies of the Municipality of Copenhagen, which registers have been exhibited to me on this day. I further certify that Mr. Winther is a member of the board of directors and Mr. Witzke one of the Managers of the above named Joint-stock company, and that Mr. Witzke is entitled to sign above on behalf of the said company.

Done and passed at the office of the said company, No. 6 Kongens Nytow, in the presence of the hereunto subscribing notarial witnesses, Messrs. Ove Fredericksen and K. Sigvartsen.

In testimony whereof under my hand and the notarial seal of offices.

Copenhagen, year and day first above written.

C. MOLTVED,
Sub-notary.

(Seal)

OVE FREDERICKSEN,
K. SIGVARTSEN,
Witnesses.

Fees and Stamps, etc., 1070. Ten Crowns.

31 Consulate General of the United States of America. Copenhagen, Denmark.

I, E. D. Winslow, Consul-General of the United States of America at Copenhagen, Denmark, do hereby certify that the seal of the Notary Public in and for the City of Copenhagen, Denmark, and the signature of C. Moltved, Sub Notary Public is and for the City of Copenhagen in the Kingdom of Denmark to the instrument of writing hereto annexed, are true and genuine, and as such are entitled to full faith and credit.

In testimony whereof, I have hereunto subscribed my name and affixed my Seal of office, this 13th day of September, A. D. 1916.

E. D. WINSLOW,
Consul General of the
United States of America.

(American Consular Service $2 Fee Stamp.) No. 1063

Filed October 8, 1925. A. J. Ramsay, Clerk, by E. G. Lindsey, D. C.

BOND FOR REMOVAL TO U. S. DISTRICT COURT.

Be it known that the undersigned Skandinavia Insurance Company, Limited, as principal and the American Surety Company of New York, as surety, are held and firmly bound unto Morris & Company, a corporation, in the sum of five hundred dollars, for the payment of which well and truly to be made unto the said Morris & Company, a corporation, its successors and assigns, the said Skandinavia Insurance Company, Limited, and the said American Surety Company of New York bind respectively, severally and jointly, themselves and their and each of their successors and assigns, firmly by these presents; upon condition nevertheless that:

32

Whereas the above named Morris & Company, a corporation, did heretofore bring a suit of a civil nature against the above named Skandinavia Insurance Company, Limited, in the Circuit Court of Harrison County, Mississippi;

And whereas the said Skandinavia Insurance Company, Limited, simultaneously with the filing of this bond will file its petition in the said Circuit Court of Harrison County, Mississippi, for the removal of the said suit into the District Court of the United States in and for the Southern Division of the Southern District of Miss. according to the provisions of the Acts of Congress in such case made and provided:

Now therefore, the condition of this obligation is such that if the said petitioner, the Skandinavia Insurance Company, Limited, shall enter in the District Court

of the United States for the Southern Division of the Southern District of Mississippi within thirty days after the date of filing of this petition, a certified copy of the record in such suit and shall well and truly pay all costs that may be awarded by the said District Court of the United States, if such Court shall hold that such suit was wrongfully or improperly removed thereto, and shall also appear and enter special bail in such suit if special bail was originally requisite therein; then the above obligation shall be void but shall otherwise re-
33 main in full force and virtue.

In testimony of all which, the said principal and surety have caused these presents to be signed with their names and sealed with their seals this 11th day of Sept., A. D. 1925.

SKANDINAVIA INSURANCE
(Seal) COMPANY, LIMITED,
By WM. H. McGEE & CO.,
Managers U. S. Marine Dept.
Its H. JACKSON, Vice President.
Thereunto lawfully authorized.

AMERICAN SURETY COM-
(Seal) PANY OF NEW YORK.
By S. A. TOMLINSON,
Its Duly Authorized Attorney
in Fact.

The foregoing bond and surety accepted and approved, this 12th day of October, 1925.

W. A. WHITE,
Circuit Judge.

25c canceled I. R. Stamp

American Surety Company of New York.
Capital $5,000,000.

Limited Power of Attorney.

Know all men by these presents:

The American Surety Company of New York, a corporation of the State of New York, of No. 100 Broadway, in the City of New York, in said State, has made, constituted and appointed, and by these presents does hereby make, constitute and appoint S. A. Tomlinson its true, sufficient and lawful attorney, with full power and authority to make, execute and deliver, for it, in its name and in its behalf as surety, a bond or
34 undertaking, as follows: Removal bond not exceeding $500.00 on behalf of Morris & Company in its suit versus Skandianvia Insurance Company, hereby giving its said attorney full power and authority to do everything whatsoever requisite and necessary to be done for the purpose of making, executing and delivering such obligations as fully as the officers of said American Surety Company of New York could do if personally present, and hereby ratifying and confirming all that its said attorney shall lawfully do or cause to be done by virtue hereof, but reserving to itself full power of substitution and revocation.

The authority contained herein is void if not availed of within thirty days from the date of this instrument.

In witness whereof, the said American Surety Company of New York has caused its corporate seal to be hereunto affixed and these presents to be duly executed by

its proper officers at the City of New Orleans, State of Louisiana, on this 5th day of October, 1925.

AMERICAN SURETY COMPANY OF NEW YORK.

(Seal) By H. McGEE,
Resident Vice-President.

Attest:

SHELTON SANDOZ,
Resident Assistant Secretary.

At a regular meeting of the Executive Committee of the Board of Trustees of the American Surety Co. of New York, held at the office of the Company at No. 100 Broadway, in the City of New York, on the twentieth day of August, 1912, the following resolution was adopted:

"Resolved that one of the Resident Vice-Presidents, and one of the Resident Assistant Secretaries of this Co. at New Orleans, in the State of Louisiana, be and they hereby are authorized and empowered to make, execute and deliver, in behalf of the Company, unto such person or persons in the States of Louisiana and Mis-
35 sissippi, as they may select, its power of attorney constituting and appointing each such person its Attorney in Fact, with full power and authority to make, execute and deliver, for it, in its name and in its behalf, as surety, any particular bond or undertaking that may be required in the same States of Louisiana and Mississippi, the nature of such bond or undertaking to be in each instance specified in such power of attorney."

State of New York,
County of New York, ss.

I, H. E. Ising, Assistant Secretary of the American Surety Co. of New York, hereby certify that I have compared the foregoing resolution with the original thereof, as recorded in the Minute Book of said Company, and that the same is a true and correct transcript therefrom and of the whole of said original resolution.

Given under my hand and the seal of the Company at the City of New York, this 2nd day of February, 1925.

H. E. ISING,
Assistant Secretary.

Filed October 8, 1925. A. J. Ramsay, Circuit Clerk, by E. G. Lindsey, D. C.

36 ORDER REMOVING CAUSE TO U. S. DISTRICT COURT

Morris & Company,
vs. No. 7975.
Skandinavia Insurance Company, Limited

It appearing to the Court that the Defendant in the above stated case has filed in this Court in said cause, a Petition for the removal of the cause to the Southern Division of the Southern District of the United States Court for Mississippi, together with Bond in the sum of Five Hundred ($500.00) Dollars, conditioned according to law, with American Surety Company of New York, as surety, which said bond is hereby accepted and approved

by this Court. It is ordered by this Court that the prayer of said Petition be granted and that the Clerk of this Court be and he is hereby directed to file a transcript of the record in this cause together with said bond in said Division of said Court at Biloxi, Mississippi, within the time as required by law in such cases.

Ordered this 12th day of October, 1925.

W. A. WHITE, Judge.

October Term, 1925.

October 12, 1925.

37 CERTIFICATE.

The State of Mississippi,
Harrison County.

I, A. J. Ramsay, Clerk of the Circuit Court of said County and State, do hereby certify that the foregoing 27 pages contain a true, correct and complete Transcript of the Record in cause No. 7975, styled, Morris & Company versus Skandinavia Insurance Company, Limited, of Copenhagen, Denmark, upon the General Civil Docket of said Court, including the Order of Court removing said cause to the U. S. District Court at Biloxi, Mississippi, as the original of same appear of record and remain on file in my office.

Given under my hand and official seal, this the 27th day of October, A. D. 1925.

A. J. RAMSAY,
Clerk of the Circuit Court, of
(Seal of the Court) Harrison County, Mississippi.

By E. G. LINDSEY, D. C.

38 In the District Court of the United States for the Southern Division of the Southern District of Mississippi.

Morris & Company, Plaintiff,

vs. No. 439 at Law.

Skandinavia Insurance Company, Limited, Defendant.

Be it remembered, that, on to-wit, the 7th day of September, 1927, the same being one of the days of the September Term, 1927, of the District Court of the United States for the Southern Division of the Southern District of Mississippi, at Biloxi, Mississippi, the above numbered and entitled cause came on for final hearing, the Honorable Edwin R. Holmes, Judge of said Court, presiding, and the other officers of the Court being present and acting.

That said cause came on to be heard on the pleadings of the defendant and the replications of the plaintiff and on the demurrers of the defendant to the replications of the Plaintiff and on the issue being joined by the plaintiff's replications to the pleas of the defendant, all of which more fully appear hereinafter, and all of which pleas, replications, demurrers and motions are hereinafter set out which raised the questions of law to be determined, together with the rulings of the
39 Court thereon and the exceptions of the plaintiff taken and allowed, and the rulings of the Court made herein at previous terms being also fully set out hereinafter; and a jury was duly impaneled and sworn to try said issue joined.

The defendant filed a motion to quash the service of process of the defendant, appearing specially for that

purpose only, on November 27, 1925, and, appearing specially for that service only, on November 27, 1925, also filed a plea to the jurisdiction, to which, on February 21, 1927, the plaintiff filed a demurrer to the defendant's motion and to the plea in abatement, which demurrer the defendant moved to strike from the files by its motion filed February 23, 1927, and on the hearing of which, counsel for plaintiff admitted in response to question of counsel for the defendant, that the suit in New York had been dismissed and the Court thereupon declined to permit the demurrer of the plaintiff to be filed, and permitted the plaintiff to file several replications to each of the defendant's pleas in abatement, and directed the plaintiff to traverse or admit or otherwise to reply to the allegations contained in the motion to quash the process.

That plaintiff thereupon filed an answer to the motion of the defendant to quash the return on the process, on the 13th day of May, 1927, and on the 13th day of May, 1927, the plaintiff filed ten replications to the defendant's plea in abatement and filed a replication to the defendant's second plea in abatement, on May 13, 1927—the defendant, specially appearing for that purpose only, having filed a second plea in abatement of another suit pending; and all of which were filed by leave of the Court.

On the 17th day of May, 1927, the defendant, appearing specially for that purpose only, filed its pleas to the jurisdiction to the Second or new count of the plaintiff's complaint, added by amendment; and on May 23, 1927, the defendant by special appearance for that purpose only, filed demurrer to the plaintiff's answers to the defendant's motion to quash the process, except as to the answer numbered VII, on the same date it filed

a joinder of issue on said answer numbered VII, and on May 23, 1927, the defendant, continuing its special appearance, and appearing for that purpose only, filed demurrers to the Plaintiff's replications to plea to the jurisdiction; and, on June 13, 1927, continuing its special appearance for that purpose only, the defendant filed additional grounds of demurrer to certain answers filed by the plaintiff to the defendant's motion to quash the process; and on June 13, 1927, continuing its special appearance, for that purpose only, the defendant filed additional grounds of demurrer to certain replications filed by plaintiff to defendants' plea to the juris-
41 diction; all of which were heard; all of which were heard on the 7th day of September, 1927, as shown by the following pages hereinafter set out, and, on said 7 day of September, 1927, all of the evidence was heard before the jury on the issue joined, and, after all of the evidence had been heard, the Court peremptorily instructed the jury to find for the defendant, that the defendant was not doing business in the State of Mississippi; all of which evidence is contained in this bill of exceptions, hereinafter set out, together with all of the rulings of the Court on the questions of law raised by the pleadings and all of the exceptions of the plaintiff raised on the pleadings, evidence and instructions and allowed by the Court being set forth in the following pages, to-wit:

42 **MOTION TO QUASH SERVICE OF SUMMONS**

(Title Omitted.)

Comes the said Skandinavia Insurance Company, Limited, and appears specially for the purpose of making the motion hereinafter set out and for no other purpose,

And said Skandinavia Insurance Company, Limited, moves this Honorable Court to quash and set aside the attempted service of summons in this case and to dismiss the case for want of jurisdiction over the person of the said Skandinavia Insurance Company, Limited, for that it appears from the declaration, and the the exhibit thereto, filed by the plaintiff herein, that the plaintiff is a non-resident of the State of Mississippi and is a corporation and existing under the laws of and is a citizen and resident of the State of Louisiana; that the defendant is a non-resident of the State of Mississippi and is a corporation and citizen and resident of the Kingdom of Denmark; that the contract sued on was made and was to be performed wholly without the State of Mississippi; that the subject matter of the insurance was at all times wholly without the State of Mississippi and that the cause of action, if any there be, arose without the State of Mississippi.

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And this movant avers that it was not doing business in the State of Mississippi at the time this suit was brought, was not found therein, was not amendable to the service of summons attempted to be made on it in this case and has not waived its rights in the premises by voluntary appearance or otherwise.

PELLAN, COWLEY & GRESHAM,
LEATHERS & SYKES,
Attorneys for the Skandinavia Insurance Company, Limited

Filed Nov. 27, 1925.

44 PLEA TO JURISDICTION.

(Title Omitted.)

Comes the said Skandinavia Insurance Company, Limited, and appears specially for the purpose of filing the pleas and motions hereinafter set out, and for no other purpose.

1. The said Skandinavia Insurance Company, Limited, says and shows to this Honorable Court that the Court is without jurisdiction of the person of it the said defendant, because the attempted service of process on it was and is a abortive and void, for that it appears from the declaration filed herein by the said plaintiff, that the plaintiff is not a resident of the State of Mississipi but is a corporation organized and existing under the laws of and is a citizen and resident of the State of Lonisiana; that the defendant is not a citizen of the State of Mississippi but is a corporation and citizen and resident of the Kingdom of Denmark; that the contract sued on was made without the State of Mississippi; and was to be performed wholly without the State of Mississippi; and that the cause of action, if any there be, arose without the State of Mississippi. And
45 defendant avers that it was not doing business in the State of Mississippi at the time this suit was brought; that it was not found within the said State; that it was not amendable to the service of summons attempted to be made on it in this case; and that it has not waived its rights in the premises by voluntary appearance or otherwise; wherefore defendant prays judgment of the said attempted service of summons, that

it be quashed and set aside and that the case be dismissed for want of jurisdiction over the person of this defendant.

II. And for further plea and motion, this defendant still appearing specially and solely for the purpose of asserting its rights as in these pleas and motions set out, says that if this Honorable Court should hold that jurisdiction of defendant's person has been obtained, then this defendant, not waiving its insistence but respectfully insisting, reiterating and reasserting that this Honorable Court is without jurisdiction of defendant's person; says that it ought not to be held in this action to answer the writ and declaration of the plaintiff filed and promoted against the defendant herein, but the same ought to abate or be stayed; because, it says, the said plaintiff heretofore, to wit, at the Honorable the District Court of the United States for the Southern District of New York, holden in the City of New York in the State of New York, on to wit, the fifteenth day of November, 1921, impleaded the said defendant in a personal action in Admiralty for the same cause in the declaration aforesaid above mentioned and seeking the same relief to wit, a money judgment in personam against this defendant; which said action of the said plaintiff against the said defendant, still remains depending and undetermined, as appears by a duly authenticated copy of the files and records of the said Court, which will be produced at the hearing of this plea and motion. And the said defendant avers that the said Morris & Company named as libelant in the said action brought in the said District Court of the United States for the Southern District of New York, is the same Morris & Company that is the plaintiff in the instant suit; and that the Scandinavia Reinsurance

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Company, Ltd., named as defendant in the said libel as aforesaid, is one and the same corporation with the Scandinavia Insurance Company, Limited, named as defendant in the instant action. And defendant avers that the said District Court of the United States for the Southern District of New York, had and has jurisdiction of the action hereinbefore mentioned as brought therein by the said plaintiff against the defendant, and plaintiff's remedy therein was and is as ample and efficient as the remedy sought in the instant suit, and
47 this defendant appeared in the said action and defended and is now defending therein. And this the defendant is ready to verify:

Wherefore it prays judgment of the said writ and declaration and that the same may be quashed; or, if the Court should be of opinion that the proper relief is not the quashing of the writ but a suspension of this proceeding, then and in that event, that this Honorable Court will make and enter and order that this suit do stay and be suspended and respited until the said action so pending as aforesaid in the District Court of the United States for the Southern District of New York, should have been determined.

PILLANS, COWLEY & GRESHAM,
LEATHERS & SYKES,
Attorneys for defendant.

State of Alabama,
County of Mobile.

Before me, the undersigned officer authorized to administer oaths, this day personally appeared Palmer Pillans, who being by me duly sworn, doth on oath depose and say as follows:

48 I am a member of the law firm of Pillans, Cowley & Gresham and as such have had charge, for defendant, of the preparation of the defense of the above entitled action. As to the averments, in both the plea to the jurisdiction and the plea of lis pendens, of matter dehors the record, I am informed that they are true and do verily believe them to be true and do make oath thereto on such information and belief.

PALMER PILLANS.

Subscribed and sworn to before me this 25 day of November, A. D. 1925.

BERTHA SOSSAMAN,
Notary Public, Mobile County, Alabama.

(Seal)

Filed Nov. 27, 1925.

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49 NOTICE OF FILING OF INTERROGATORIES TO DEFENDANT.

(Title Omitted.)

To Skandinavian Insurance Company, Ltd., Defendant, or to Messrs. Leathers & Sykes, of Gulfport, Mississippi, and Messrs. Pillans, Cowling & Gresham, of Mobile, Alabama, its Attorneys of Record:

You will take notice that the plaintiff has this day filed Interrogatories to the Defendant herein in the office of the Clerk of the United States District Court for the Southern Division of the Southern District of Mississippi, at Biloxi, Mississippi.

A copy of said Interrogatories, together with a copy of the Exhibit annexed thereto is hereto attached.

This the 12th day of January, 1927.

MORRIS & COMPANY,
Plaintiff.

By S. C. MIZE,
One of attorneys of Record
for the Plaintiff.

I, S. C. Mize, one of the Attorneys of Record for Morris & Company, plaintiff in the suit styled in the foregoing notice, do hereby certify that I have this day given to Messrs. Leathers & Sykes, attorneys of record for the defendant in said cause, Gulfport, Mississippi, a true and correct copy of the Interrogatories to defendant hereto attached, together with a copy of the Exhibit annexed to said Interrogatories, and copy of the notice of the filing of said interrogatories in said cause.

Witness my signature, this the 12th day of January, 1927.

S. C. MIZE.
Of Attorneys for Plaintiff.

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50 INTERROGATORIES TO THE DEFENDANT.

(Title Omitted.)

To the Skandinavia Insurance Company, Defendant, or Leathers & Sykes, Gulfport, Mississippi, and Pillans, Cowley & Gresham, Mobile, Alabama, Attorneys of Record for Defendant:

Now comes Morris & Company, Plaintiff herein, and under and by virtue of the authority of Section 1598, Hemingway's Code of Mississippi, propounds to the Skandinavia Insurance Company, Limited, a non resident defendant, the following interrogatories:

Interrogatories No. One.

In the report made by you to the Commissioner of Insurance of the State of Mississippi, covering the period 1925, you made a report of fire risks, $3,909,510. Please annex the instruments whereunder this liability was assured, and mark the same Exhibit "A," to these interrogatories.

If these originals are not available, give the names of the companies with whom these contracts were made and the amounts of each.

51 Interrogatories No. Two.

During the same time, there is under Risks Canceled, a return of $1,413,572.00.

As to these risks, please state what risks they were—how they were canceled, and what was the method of procedure, with reference thereto. If these cancellations were accomplished by letters, annex the same, and if by word of mouth, who made the transactions and with whom were they made.

Interrogatories No. Three.

Give a list of the reinsurance companies wherein the $1,131,723 of reinsurance was placed.

Interrogatory No. Four.

In the report filed by you, it is said that you wrote reinsurance on Mississippi properties during the year 1925 aggregating $4,357,677. Please state whether or not that is a fact.

Interrogatory No. Five.

It is stated in your report to the Commissioner of Insurance of the State of Mississippi, during the year 1925, that you received gross premiums from business in Mississippi aggregating $64,870.58. Please state whether or not that statement is accurate.

Interrogatory No. Six.

Please give a list of all losses suffered in Mississippi during the year 1925, and detail where each of
52 these losses were, and how adjustments of such losses were made.

Interrogatory No. Seven.

Please state whether or not it is not a fact that in the year 1924 the annexed report report, summarized, is not true and correct, in what particulars is it incor- true and correct. And if not true and correct, in what particulars was it incorrect.

Interrogatory No. 8.

Please state whether or not the annexed report for the year 1923, as summarized, to the Commissioner of Insurance, is it not true and correct? And if the same is not true and correct, in what particulars is it incorrect, and why was it made, if incorrect, in the form wherein you submitted it?

Interrogatory No. Nine.

Please state what tax you paid to the State of Mississippi in the year 1923, and why you paid it?

Interrogatory No. Ten.

Were these taxes voluntarily paid?

Interrogatory No. Eleven.

Please state what tax you paid to the State of Mississippi for the year 1924.

53 Interrogatory No. Twelve.

Were these taxes voluntarily paid?

Interrogatory No. Thirteen.

Please state what taxes you paid to the State of Mississippi in the year 1925?

Interrogatory No. Fourteen.

Were these taxes voluntarily paid?

Interrogatory No. Fifteen.

Please state what taxes you paid to the state of Mississippi in the year 1926.

Interrogatory No. Sixteen.

When did you pay them?

Interrogatory No. Seventeen.

Were these taxes paid voluntarily?

Interrogatory No. Eighteen.

Please annex the original, if you have it, of the power of attorney executed by you to the Hon. T. M. Henery, Insurance Commissioner of the State of Mississippi.

Interrogatory No. Nineteen.

Was this power of attorney voluntarily executed by your corporation?

Interrogatory No. Twenty.

State what notice, if any, you have ever given Hon. T. M. Henery, in writing, that you were revoked or annulled the power of attorney executed to him when you applied to do business in the state of Mississippi?

54 Interrogatory No. Twenty-one.

Please annex the original power of attorney executed by you to R. C. Wilkerson, of Vicksburg, Mississippi, or to the R. C. Wilkerson Insurance Company of Vicksburg, Mississippi.

Interrogatory No. Twenty-two.

Was this power of attorney executed voluntarily?

Interrogatory No. Twenty-three.

What notices if any in writing, have you ever given to any person that this power of attorney was involuntarily executed, or that you desired to revoke the same.

Interrogatory No. Twenty-four.

Detail at large the business being done by you in the State of Mississippi subsequent to the report made for 1925, and given in that report exactly the same figures in exactly the same columns as were given to the Insurance Commissioners for that year.

Interrogatory No. Twenty-five.

Is it not a fact that you have had advertisements made in the state of Mississippi by the Insurance Commissioner of your condition, holding the same out to the people of the State of Mississippi as to the condition of your company?

Interrogatory No. Twenty-six.

Please state in what newspaper in the state of Mississippi you had those statements made and published, and annex to these interrogatories copies of each of said statements giving in detail the same.

Interrogatory No. Twenty-seven.

How were these publications in these several newspapers made?

Interrogatory No. Twenty-eight.

Who transmitted to the Insurance Commissioner of the State of Mississippi said statements?

Interrogatory No. Twenty-nine.

Did you or not authorize the payment of these accounts for such publication made in the state of Mississippi during each of these years?

Interrogatory No. Thirty

Did you know that these publications were being made each year in the state of Mississippi in pursuance of the requirements of the laws of the state of Mississippi?

Interrogatory No. Thirty-one.

What dissent did you ever make or cause to be made to the state of Mississippi with reference to a compliance with its laws as to publishing in its papers as to your condition?

56 Interrogatory No. Thirty-two.

Annex copies of the letter written by you to the Insurance Commissioner of the State of Mississippi authorizing the publication of the statement in the State of Mississippi showing your condition.

Interrogatory No. Thirty three

Please state whether or not these publications thus made in the state of Mississippi through the Insurance Commissioner were paid for by you and were made with your knowledge?

Interrogatory No. Thirty-four.

If you did or not authorize these publications to be made in the state of Mississippi, why did you pay therefor?

Interrogatory No. Thirty-five.

Who made these arrangements for publication of these statements in the state of Mississippi in these newspapers for and on your behalf.

Interrogatory No. Thirty-six.

Who conducted the correspondence appointing R. C. Wilkerson your resident agent in Mississippi?

Interrogatory No. Thirty-seven.

Was this appointment voluntarily?

Interrogatory No. Thirty-eight.

Was it not a fact that you were a party defendant in the suit of Stokes vs. Roberston vs. the Aetna Insurance Company et al., in the State of Mississippi.

37 Interrogatory No. Thirty-nine.

Was it not a fact that you contributed to the expense of the employment of counsel in Mississippi at that time?

Interrogatory No. Forty.

Give the amount of money that you paid for employment of counsel in Mississippi towards the defense of this cause in the State of Mississippi at that time.

Interrogatory No. Forty-one.

Did you not at that time authorize the announcement that you were withdrawing from the state of Mississippi by reason of that suit and would not do business in the State of Mississippi by reason of that suit?

Interrogatory No. Forty-two.

Did you not authorize the announcement when the other insurance companies returned to Mississippi that you would return to Mississippi, and did you return to Mississippi and qualify in Mississippi.

Interrogatory No. Forty-three.

When and where did you ever notify anyone officially in the state of Mississippi that you would not do direct insurance business in the state of Mississippi.

Interrogatory No. Forty-four.

How did you obtain a participation in Sprinkler-leakage insurance in Mississippi and through what companies did this reinsurance occur.

58 Interrogatory No. Forty-five.

In adjusting liability in Mississippi under these policies, what amount was charged to you for such adjustments?

Interrogatory No. Forty-six.

Is it not a fact that on the adjustments you were debited by the direct writing company with your pro rata of the cost of adjustment?

Interrogatory No. Forty-seven.

Is it not a fact that where there was a contest made of the claim that you were debited with the pro rata cost of such defense?

Interrogatory No. Forty-eight.

In what manner did you determine what risks within the state of Mississippi are suitable for carriage by you?

Interrogatory No. Forty-nine.

Is it not a fact that in pursuance of Section 5071 of the Code, which provides

"Returns as to reinsurance to be made annually or oftener, if required.—Every fire insurance company now or hereafter admitted shall annually, and at such other times as the Commissioner may require, in addition to all of the terms now, by law, required of it, or its agents or managers, make a return to the insurance commissioner in such forms and detail as may be pre-
59 scribed by him of all insurance contracted for or effected by it directly or indirectly, upon property located in the state of Mississippi, such return to be sworn to by its president and secretary, if a company of any other state of the the United States, and if a company of a foreign country, by its president and secretary, or by officers corresponding thereto, as to reinsurance as aforesaid contracted for, or effected through the foreign office, and by the United States

Manager as to such reinsurance effected by the United States branch, and if any company, domestic or foreign, shall directly or indirectly reinsure any risk taken by it on any property located in Mississippi, in any company not duly authorized to transact business herein, except as hereinbefore provided, or if it shall refuse or neglect to make the returns required in this section, the said Commissioner shall revoke its authority to transact business in this state." .....

You made returns under oath to the insurance commissioner of the state of Mississippi.

Interrogatory No. Fifty.

Are these returns, sworn to, accurate reflections of business done?

(1) Class.	(2) Gross Risks Written	(3) Risks Canceled	(4) Reinsurance In Co's. Aut. in Mississippi	(5) Total Deductions Col. 3 Plus 4.	(6) Net Risks Written Col. 2 Minus 5.
Fire	$462,582	$206,482	$124,452	$220,934	$131,648
Tornado, Wind & Cyclone	70,609	34,115	10,947	45,062	25,547
Sprinkler Leakage	2,475	500	593	1,093	1,382
	$535,666	$241,097	135,992	377,089	158,577

Premiums Received.

(1) Class.	(2) Gross Premiums on Risks Written.	(3) Return Premiums.	(4) Premiums for Reinsurance in Co's Aut. in Miss.	(5) Total Deductions Col. 3 & 4.	(6) Net Premiums Recd. Col. 2 Minus 5.
Fire	$7,194.86	$2,357.64	$2,432.64	$4,790.28	$2,404.58
Motor Vehicles	32.66	0	9.80	9.80	22.86

Tornado, Wind & Cyclone	510.78 .80	160.29 .32	105.14 0.23	265.43 0.25	245.35 0.55	
Sprinkler Leakage	7,739.10	2,517.95	2,547.81	5,065.76	2,673.34	

Losses Paid and Losses Incurred.

(1)	(2)	(3)	(4)	(5)	(6)	(7)
Class.	Losses Pd. (Deducting Salvage.)	Deduct Losses on Risks Reinsures in Aut. Miss.	Net Losses Pd. Col. 2 Minus 3.	Losses Incurred.	Deduct Losses on Risks Reinsured in Aut. Miss Cos.	Net Losses Incurred Col. 5 Minus 6.
Fire	$8,921.45	$3,203.19	$5,718.62	11,540.30	4,138.84	7,410.46
Tornado, Wind & Cyclone	1,753.71	547.72	1,207.99	1,725.71	547.72	1,207.99
Sprinkler Leakage	0	0		0.62	0.19	0.43
Total	10,647.16	3,720.91	6,926.25	13,266.25	4,656.75	8,609.88

Risks Written.

(1) Class.	(2) Gross Risks Written.	(3) Risks Canceled.	(4) Reinsurance in Co's. Aut. in Miss.	(5) Total Deductions Col. 3 Plus 4.	(6) Net Risks Written Col. 2 Minus 5.
Fire	$1,885,49	641,669	$1,253,831	1,895,500	10,008
Tornado, Wind & Cyclone	349,664	71,499	83,449	154,948	194,716
Sprinkler Leakage	31,100	4,925	7,853	12,778	18,332
	$2,266,256	718,093	1,345,133	2,036,226	203,030

Premiums Received.

(1) Class.	(2) Gross Premiums on Risks Received.	(3) Return Premiums.	(4) Premiums for Reinsurance in Aut. Miss. Companies.	(5) Total Deductions Col. 3 Plus 4.	(6) Net Premiums Rec. Col. 2 Minus 5.
Fire	27,029.33	7,656.83	16,274.89	23,931.72	3,097.61

Tornado, Wind & Cyclone	2,144.53	249.36	568.55	817.91	1,326.62
Sprinkler Leakage	14.40	0.12	4.28	4.40	10.00
	27,188.26	9,906.31	16,847.72	24,754.03	4,434.23

62 Losses Paid and Losses Incurred.

(1) Class	(2) Losses Pd. (Deducting Salvage.	(3) Deducting Losses on Risks Reinsured in Aut. Miss. Companies.	(4) Net Losses Paid Col. 2 Minus 3.	(5) Losses Incurred.	(6) Deduct Losses on Risks Reinsured in Aut. Miss. Cos.	(7) Net Losses Incurred Col. 5 Minus 6.
Fire	15,138.25	7,652.86	7,485.39	18,615.52	10,293.23	8,322.29
Tornado, Wind & Cyclone	75.62	22.69	52.93	76.37	22.92	53.45
Sprinkler Leakage	2.22	0.66	1.55	1.60	0.47	1.13
	15,216.09	7,676.21	7,539.88	18,693.49	10,316.62	8,376.87

Risks Written

(1) Class	(2) Gross Risks Written	(3) Risks Canceled	(4) Reinsurance in Co's. Aut. in Miss.	(5) Total Deductions Col. 3 Plus 4	(6) Net Risks Written Col. 2 Minus 5
Fire	3,989,510	1,415,572	1,131,723	2,545,295	1,364,215
Tornado, Wind & Cyclone	402,770	137,785	0	137,785	264,985
Sprinkler Leakage	45,052	19,813	0	19,813	25,229
	4,357,677	1,571,170	1,131,723	2,702,893	1,654,804

Premiums Received

(1) Class	(2) Gross Prem. on Risks Written	(3) Return Premiums	(4) Prem. for Reinsurance in Co's. Aut. in Miss.	(5) Total Deductions Col. 3 Plus 4	(6) Net Prem. Recd. Col. 2 Minus 5
Fire	62,614.56	16,534.10	17,048.76	33,582.86	29,031.70
Tornado, Windstorm & Cyclone	2,236.93	512.51	0	512.51	1,724.42

Sprinkler Leakage	18.15	4.40	0	4.40	13.75
Hail	.94	0	0	0	.94
	64,870.58	17,051.01	17,048.76	34,099.77	30,770.81

64

Losses Paid and Losses Incurred.

(1)	(2)	(3)	(4)	(5)	(6)	(7)
Class.	Losses Pd. Deducting Salvage.	Deduct Losses on Risks Reinsured in Ant. Miss. Companies.	Net Losses Paid Col. 2 Minus 3.	Losses Incurred.	Deduct Losses on Risks Reinsured in Ant. Miss Cos.	Net Losses Incurred Col. 5 Minus Col. 6.
Fire	14,353.22	11,882.81	2,470.41	13,844.56	12,762.79	1,081.77
Tornado, Wind & Cyclone..	12.29	0	12.29	12.34	0.23	12.57
Sprinkler Leakage..	0	0	0	0	0	0
	14,365.51	11,882.81	2,482.70	13,856.90	12,762.56	1,094.34

65 MOTION TO SURPRESS AND STRIKE PLTFF'S INTERROGATORIES.

(Title Omitted.)

Comes the said Skandinavia Insurance Company, Ltd., and appears specially for the purpose of making this motion and for no other purpose. And the said Skandinavia Insurance Company, Ltd., prays that this Honorable Court will suppress and strike from the files those certain interrogatories attempted to be propounded by the said plaintiff to the said defendant, by filing the said interrogatories in the office of the Clerk of the District Court of the United States for the Southern District of Mississippi, Southern Division, at Biloxi, on to-wit, the 12th day of January 1927. And for grounds of such motion, defendant assigns the following:

1. The filing and attempted propounding of the said interrogatories is not warranted by the Acts of Congress governing the practice in the Courts of the United States nor by the settled practice or procedure of the said Courts.

2. The said interrogatories attempt to procure a summary discovery at law in a fashion not contemplated in the Federal practice nor provided for by any statute of the United States.

66 3. The said interrogatories attempt to procure evidence in advance of the trial in a fashion not provided for by the statutes and practice governing the adducing of testimony in the Courts of the United States.

4. The said interrogatories seek to procure the production of papers and documents in advance of the trial, which may not be had under the statutes and practice of the Courts of the United States.

5. The said interrogatories attempt to apply in the United States Court a practice set up by a State Statute and applicable only in the State Court and not in the United States Court.

PELLAN, COWLEY & GRESHAM
AND LEATHERS & SYKES,
Attorneys for the Skandinavia
Insurance Company Ltd., appearing specially for the purpose of making this motion and for no other purpose.

Filed Jan. 22, 1927.

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67 ORDER SUSTAINING MOTION TO STRIKE INTERROGATORIES.

(Title Omitted.)

Present and presiding the Hon. Edwin R. Holmes, District Judge:

This cause coming on to be heard on motion of the Skandinavia Insurance Company, Ltd., appearing specially for the purpose of making said motion, to suppress and strike from the files those certain interrogatories propounded by the plaintiff to the said defendant, Skandinavia Insurance Company, Ltd., filed in the office of the Clerk of this Court at Biloxi, on, to-wit, January 12, 1927; and the Court having duly considered the said

motion and the briefs of the counsel of the parties hereto both for and against said motion, is of the opinion that the said motion to strike said interrogatories should be sustained:

Now, therefore, it is ordered, adjudged and decreed by the Court that the motion of the defendant, Skandinavia Insurance Company, Ltd., to strike from the files those interrogatories filed by the plaintiff to said de-
68 fendant in the offices of the Clerk of this Court at Biloxi, on, to-wit, January 12, 1927, be and the same hereby is sustained; and that said interrogatorie be and the same are hereby suppressed and stricken from the files of this Court.

This the 12th day of February, 1927.

E. R. HOLMES, District Judge.

Filed February 14, 1927.

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69 MOTION TO STRIKE FROM THE FILES THE INTERROGATORIES PROPOUNDED TO THE DEFENDANT BY THE PLAINTIFF, UNDER SECTION 1938 OF THE MISSISSIPPI CODE OF L(... (1598 OF HEMINGWAY'S CODE).

(Title Omitted.)

Pillans, Cowley & Gresham, Mobile Alabama.
Leathers & Sykes, Gulfport, Mississippi, Attorneys for Defendant.

Green, Green & Poter, Jackson, Mississippi, Attorneys for Plaintiff.

OPINION OF THE COURT.

This is an action of law on a policy of insurance against a non-resident corporation.

Section 1398 of the Mississippi Code of 1906 (1598 of Hemingway's Code) provides:

"If the testimony of the party to the suit who resides out of the State be desired by the adverse party, interrogatories to him may be filed in the Clerk's office, and a copy thereof, with notice of filing, shall be given the party, or his attorney or solicitor; and if he fail
70 to answer such interrogatories within a reasonable time, his plea shall be dismissed, if he be plaintiff or complainant, and if he be defendant his plea or answer may be taken off the file and judgment by the default entered or the bill be taken as confessed."

Under the section just quoted, the plaintiff propounded to the defendant, by filing the same in the Clerk's office, elaborate interrogatories which the defendant has moved to strike from the files as unwarranted by the practice in this Court.

The Mississippi Supreme Court has held the section constitutional and applicable to actions at law, as well as suits in equity, and that a corporation can be compelled to answer such interrogatories by its proper officer or agent. Illinois Central Railroad Company v. Sanford, 75 Mississippi, 862, 23 Son. 355.

Similar statutes have been quite commonly enacted by other states in the Union, and frequently have been before the Federal Courts in an attempt to adopt the state practice under the Conformity Act. (Revised Statutes, 914.)

In 1885 the Supreme Court held, in ex parte Fisk, 113 U. S. 713, that a Similar New York Statute, permitting a party to a suit to be examined by his adversary as a witness at any time previous to the
71 trial in an action at law, was in conflict with a provision of Section 861 of the Revised Statutes of the United States, which enacts that the mode of proof shall be by oral testimony in open Court, with certain exceptions, none of which were found to provide for such an examination in advance of the trial as the statute of New York permitted.

The case is directly in point here, but it is contended that subsequent Congressional legislation has made a material change in the ruling therein announced.

In 1892 Congress passed an act entitled, "An Act to provide an additional mode of taking depositions of witnesses in cases pending in Courts of the United States." (Act of March 9, 1892, chapter 14; U. S. Compiled Statutes of 1916, Section 1476.)

The act provides:

"In addition to the mode of taking the depositions of witnesses in cases pending at law or equity in the District and Circuit Courts of the United States it shall be lawful to take the depositions or testimony of witnesses in the mode prescribed by the laws of the state in which the Courts are held."

The latter Statute was considered by the Supreme Court in Hanks Dental Association v. Tooth Crown Company, 194 U. S. 303, and the Court held that it did not repeal or modify Section 861 of the Revised
72 Statutes, or create any additional exceptions to those specified in the subsequent sections by en-

larging the causes or grounds for taking depositions, and is not supplementary to Section 914 of the Revised Statutes.

The Court said:

"In short, the Courts of the United States are not given discretion to take depositions not authorized by Federal law, but in respect to depositions thereby authorized to be taken they may follow the Federal practice in the manner of taking, or that provided by the state law."

The fact that the defendant resides more than a hundred miles from the place of trial does not alter the question.

I conclude that the Mississippi statute in question is not applicable to an action at law in the Federal Courts, and the motion to strike the interrogatories from the files should be sustained. National Cash Register Company v. Leland, 94 Fed. 502; Smith v. International Mercantile Company, 154 Fed. 786.

It is so ordered.

Filed Mar. 11, 1927.

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73 DEMURRER TO DEFENDANT'S MOTION AND PLEA IN ABATEMENT.

(Title Omitted.)

And now comes Morris and Company, plaintiff, and demurs to the defendant's motions and plea in abatement, and for cause of said demurrer assigns the following:

1. That said motion and said pleas in abatement are not verified as required by law; and for other causes to be assigned.

S. C. MIZE,
GREEN, GREE & POTTER,
Attorneys for Plaintiff.

Filed Feb. 21, 1927.

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74 MOTION TO STRIKE DEMURRERS.

(Title Omitted.)

Comes the said defendant and moves the Court to strike from the file the demurrers filed herein by the plaintiff on, to-wit, the 21st day of February, 1927. For grounds of such motion the defendant assigns the following:

1. The demurrers were filed without leave of Court.

2. The demurrers were filed out of time and without securing leave of Court.

3. The demurrers are filed too late.

4. The demurrers are filed only four days in advance of the date fixed for trial on the pleading demurred to, although the pleading has been on file for more than a year.

5. The demurrers are filed out of the time and under circumstances of delay in filing, and the near approach

of trial, that should influence the Courts' discretion against permitting the demurrers to remain on file.

PELLAM, COWLEY & GRESHAM,
LEATHERS & SYKES,
Attorneys for Defendant.

Filed Feb. 23, 1927.

75 At said February Term, 1927, of the Court, came on to be heard the demurrer of the plaintiff, and also the motion of the defendant to strike from the files the plaintiff's demurrer to the defendant's motion to quash and the plea to the jurisdiction, when the following admission was made in open Court:

"By Mr. Pillans, of counsel for the defendant:

I am now in open Court demanding of the plaintiff to know if it be not a fact that the action in the Southern District Court of New York brought by Morris & Company against the Skandinavia Insurance Company, and set up in the plea of lis pendens, has been, since the filing of that plea in this cause, dismissed out of the said Court, and is now no longer a pending litigation.

By Mr. Green:

That is a fact."—

Whereupon the Court made the following orders:

"It appearing to the Court, and plaintiff having admitted in open Court that the suit filed in New York has been disposed of, and, therefore, the demurrer asked to be filed is on presenting a moot question of law to the Court, the Court does not think it ought to be called

upon to pass upon the moot question, and will decline to permit the demurrer to be filed which presents
76 such moot question.

This ..... day of February, A. D. 1927.

(Title Omitted.)

M. B. 6, p. 239.

This matter coming on to be heard on the defendant's motion to strike from the files the plaintiff's demurrer to the defendant's motion and plea to the jurisdiction, which demurrer was filed herein on February 21, 1927, and the Court, having heard counsel pro and con, being of opinion that the said motion should be granted,

Now it is ordered that the said motion be, and it is hereby in all things sustained, and that the said demurrer filed by plaintiff on February 21, 1927, be and it is hereby stricken from the file of the Court and held for naught, and plaintiff is directed to reply thereto.

Ordered and adjudged the 28th day of February, 1927.

E. R. HOLMES,
U. S. Judge.

77 (Title Omitted.)

Upon the motion of the plaintiff, Morris & Company, it is hereby ordered that said plaintiff may file several replications to each of the defendant's pleas in abatement and plea to the jurisdiction, and upon motion of the defendant it is hereby ordered that the plaintiff traverse or admit or otherwise reply to the allegations contained in the motion to quash the process.

Ordered and adjudged, this the 28th day of February, A. D. 1927.

E. R. HOLMES,
U. S. District Judge.

Filed Feb. 28, 1927.

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78 PLEA OF PLAINTIFF THAT DEMURRER BE SUSTAINED.

(Title Omitted.)

Now comes the plaintiff by attorney and by leave of the Court first had and obtained says that the said plea herein interposed of prior suit pending being plea predicted as to the suit in New York is wholly insufficient in law and states no answer to the said declaration because—

(1) Not properly sworn to.

(2) No answer to declaration because the suit therein pending has been brought only in personan and would in no wise interfere with the suit now here brought.

(3) Because the said suit is properly brought as appears by the averants of the declaration.

(4) Because the said suit is no vague and uncertain as that it is no plea.

(5) Because the same appears by the declaration to be no answer thereto whatsoever.

Wherefore the plaintiff prays that the said demurrer be sustained.

GREEN, POTTER & MIZE,
Plaintiff.

Filed Mar. 4, 1927.

79 ORDER.

(Title Omitted.)

This matter coming on to be heard on motion of the plaintiff to be allowed to file another demurrer to the plea of the defendant, a previous demurrer having been stricken from the files, and the plaintiff having been directed by the Court to reply to the pleas of the defendant, and it further appearing to the Court that the suit filed in New York has been disposed of, it is ordered that the motion of the plaintiff to file a demurrer to said please be denied, and upon motion of the defendant, the plaintiff is hereby ordered to traverse, admit, or otherwise reply to the allegations contained in the pleas and motion to quash of the defendant.

It is further ordered that, after the plaintiff has replied to said pleas and motion quash, and after the parties are at issue thereon, said motion and pleas to be consolidated and heard together on the issue or issues therein presented.

This 4th day of March, A. D. 1927.

E. R. HOLMES,
U. S. District Judge.

Filed Mar. 4, 1927.

80 ANSWER OF PLAINTIFF TO MOTION TO QUASH RETURNS OF PROCESS ON DEFENDANT.

Morris & Company,

vs. 489-Law.

Skandinavia Insurance Company, Ltd.

Comes Morris & Company, a corporation, herein called the plaintiff, and first expressly reserving all exceptions by it heretofore had and taken, for answer unto the motion herein made by the Skandinavia Insurance Company, Ltd., herein called defendant, to quash the return on the process issued in the State Court, and lawfully served upon the defendant, says:

I.

Beginning in 1857, the Statutes of the State of Mississippi expressly provided that corporations which exist by the laws of any other state of the Union, by the Acts of Congress, or by the laws of any foreign county, may sue in the State of Mississippi by their corporate names, and shall also be liable to be sued or proceeded against by attachment or otherwise, as individual non resident debtors may be sued or proceeded against (Code 1857, p. 297, Art. 30), and this has continued to be and is still the law of said state (Code 1871, Sec. 2416; Code 1880, Sec. 1042; Code 1892, Sec. 849; Code 1906, Sec. 914; Hemingway's Code, Section 4088), and, in addition, by section 4093 of Hemingway's Code, continu-

81 ously in effect for many years, that such corporations found doing business in this state shall be subject to suit in Mississippi to the same extent

that corporations of the State of Mississippi are subject to suit, whether the cause of action accrued in this state or not.

These sections of law were judicially construed in Pullman Palace Car Co. vs. Lawrence, 74 Mississippi, 782, at the March Term, 1897, of the Supreme Court of the State of Mississippi, which said Court was and is the highest Court of law having jurisdiction in said State, and said construction made all corporations, and especially this defendant, liable to such suit; and this construction was continued in the case of Vicksburg, Shreveport & Pacific Railway Company v. Forcheimer, 74 Southern, 419, 113 Mississippi, 531.

And said defendant, well knowing the law of the State of Mississippi, and the judicial construction uniformly thereon placed, desiring to do business in Mississippi and to reap the benefits therefrom, in pursuance of the law of the State of Mississippi, did upon the 27th day of March, 1923, make, execute and deliver to
82 the Insurance Commissioner of the State of Mississippi, a certain power of attorney, a copy of which is hereto annexed, marked Exhibit "A", and which was duly filed in the office of the Insurance Commissioner of the State of Mississippi on the 31st day of March, 1923, whereunder and whereby said defendant appointed T. M. Henery, Insurance Commissioner, its true and lawful attorney in fact, and contracted and agreed that upon said Henery process might be served in any action or legal proceeding against said defendant, and said defendant did agree that any such process so served upon the said T. M. Henery, as Insurance Commissioner, against it, the said defendant, should have the same force and validity as if served upon the Company, and did further make, execute and deliver a cer-

tain power of attorney to Robert C. Wilkerson, a resident and citizen of the State of Mississippi, and a local Insurance agent therein, (a copy thereof is filed herewith as Exhibit "a" as part hereof) whereby said defendant did authorize the said Wilkerson to accept and acknowledge service of process whether mesne or final in any action or proceeding against any said company in any of the Courts of the State of Mississippi and thereunder and thereby said defendant admitted

83 and agreed that such service should be taken and held to be valid and sufficient in that behalf, the same as if served upon said Company, according to the laws and practice of said state or any other state, and that by said instrument said defendant did then and there relinquish all claims or rights of error by reason of the manner of such service so then and there to be made.

After said March 31, 1923, there was regularly brought in the Circuit Court of Harrison County, Mississippi, this certain action against the said defendant, and in said Court there was regularly issued the process lawfully in said pending suit against the said defendant, and in accordance with law this plaintiff paid the costs to the sheriff of Hinds County requisite and necessary to have said service made upon said Insurance Commissioner of the State of Mississippi, a service upon the said defendant, in manner and form as said defendant had agreed that said service might be made, and in faith upon such agreement, and that upon the power so conferred by said defendant this plaintiff paid, laid out and expended the necessary fees for such service, which otherwise it would not have done, aggregating two dollars, under Section 5034 of Hemingway's Code, and that there-

upon said Insurance Commissioner did transmit
84 the same to the said defendant in the State of New York, which said process was by the said defendant accepted and received, as appears by Exhibit "B" hereto annexed and made part hereof, and, thereafter, when said service was so made and delivered, said defendant came into said Court and by its appearance thereby waived and relinquished all errors of every kind and character, and that thereby plaintiff says that said defendant cannot make said motion to quash for the reasons therein alleged, or for any other reason.

II.

And for another answer, reserving an aforesaid at all times, plaintiff denies that the said defendant can in this case appear specially, because it says that when said service was made upon said Insurance Commissioner by the Sheriff of Hinds County, as hereinbefore set out, it, the said defendant, was bound thereby, having agreed to accept and receive said service as a personal service, and having agreed that it would do so, and that thereafter upon the 25th day of February, 1926, the said defendant did solemnly swear, as shown by Exhibit "c" hereto annexed, that it, the said defendant, accepts in good faith
the terms and obligations of the insurance laws
85 of the said state, as a part of the consideration of its license, and ratified thereby and approved that theretofore done; and that under the law of the State of Mississippi it was expressly provided by section 2953 of Hemingway's Code, that in case a motion to quash was sustained, that thereunder it would constitute a general appearance to the next term, and plaintiff says, as thereunder provided thereby this plaintiff became entitled to proceed against the said defendant as being in Court

III.

And for another and further answer unto said motion, saving and expressly reserving, as aforesaid, plaintiff denies that defendant could herein appear specially for any purpose, and denies that it did appear specially for any purpose, and denies that it did appear specially for any purpose, and denies that there is no jurisdiction over the person of the defendant; admits plaintiff is a non resident of Mississippi, but is a corporation of the State of Louisiana, vouchsafed by the law of the State of Mississippi a right to sue therein, and denies for the purpose of this motion that the defendant is a non-
86 resident of the State of Mississippi, and denies that defendant was not subject to the process upon which it served in Mississippi, both in virtue of the appointment of the Insurance Commissioner as hereinbefore set forth and of said local agent, in accordance with the provisions of Section 5069 of Hemingway's Code, said defendant having appointed Robert C. Wilkerson, a local insurance agent as its true and lawful attorney for service of process, and thereunder and thereby said Wilkerson became and was so authorized to so accept and receive said service.

Plaintiff denies that the contract here sued on was to be performed wholly without the State of Mississippi. On the contrary, performance of said contract consisted in a payment of money on an insurance policy and was solvable in Mississippi to the extent of $50,000.00 in United States gold. Plaintiff denies that after the loss thereunder the obligation thereon was without the State of Mississippi, and denies that the cause of action was without the State of Mississippi, and denies that the defendant was not, prior to and at the time of the accru-

al of said cause of action and is not now doing business in the State of Mississippi, and denies that defendant was not found in the State of Mississippi; denies that defendant was not amendable to the service of
87 process of the Courts of the State of Mississippi so there made, denies that defendant has any alleged rights as averred in said motion, and denies that if there be such rights, they have not been waived, in manner and form as hereinbefore set forth, and denies that defendant has not formally or otherwise appeared in this Court, and submitted itself to the jurisdiction of this Court.

IV.

And expressly saving and reserving as aforesaid, for further answer to said motion to quash, plaintiff says that said defendant, well knowing the law of the State of Mississippi and the settled judicial construction thereof, constituted and appointed by Section 5069 of Hemingway's Code, subdivision 4, Robert C. Wilkerson its true and lawful agent for service of process in the State of Mississippi, and did then and has continuously since, from year to year, made payment to the said Wilkerson for his services in the State of Mississippi, which were to be performed solely and exclusively in the State of Mississippi, and were intended thus so to be by the defendant.

And further plaintiff says, that, in accord-
88 ance with the laws of the State of Mississippi, the defendant entered the State of Mississippi, to do business therein, in manner and form as by the laws of the State of Mississippi provided, and did accept in good faith the terms and conditions of the insurance laws of the State of Mississippi from year to year, as

will more fully appear by the official records, reference to which is hereby made, and that after so entering the said State of Mississippi and agreeing to comply with its said laws, then and there in the State of Mississippi certain insurance companies doing business in the said State of Mississippi conspired each with the other to violate the laws of the State of Mississippi by forming a trust and combine, and there so did, and in virtue of their having so done, thereupon Honorable Stokes v. Robertson, State Revenue Agent of the State of Mississippi, filed in the Chancery Court of Hinds County, Mississippi, a certain bill of complaint, styled Stokes v. Robertson, State Revenue Agent, versus The Aetna Insurance Company, et al., and therein defendant was one of those so thus alleged to have violated the laws of the State of Mississippi under and by virtue of those things had and done, and that said suit being so thus brought, the defendant therein was
89 served with process and did enter its appearance and did not submit to the jurisdiction of the said Chancery Court, as then and there doing business in the said State of Mississippi, and did then and there in the State of Mississippi employ for its defense in said suit certain solicitors, and among those solicitors did employ in the City of Jackson the Honorable J. B. Harris and the Honorable W. H. Watkins, and in the City of Vicksburg the Honorable R. L. McLaurin, and that said solicitors so thus employed did then and there for the said defendant appear in the Courts of the State of Mississippi and did defend said suit so about defendant brought, and that said defendant did through its solicitors cause much proof to be taken and many acts to be done for the defense of the said suit in the State of Mississippi, and did argue and present in the State

of Mississippi to the Courts of the State of Mississippi divers defenses, both in the Chancery Court of Hinds County and the Supreme Court of the State of Mississippi, and did in manner and form as by said record appears litigate to and with the State of Mississippi, in the State of Mississippi, about whether or not the defendant had, in its business done, violated the anti-trust laws of the State of Mississippi by those things therein done by said defendant.

90 Finally after several years of litigation it was finally adjudicated by the Supreme Court of the State of Mississippi that said defendant had not violated the laws of the State of Mississippi by anything done in said State.

Furthermore, when said suit was originally filed said defendant assumed to withdraw from the State of Mississippi, as having theretofore done business in the State of Mississippi, and then and there assumed to so withdraw along with certain other companies doing an insurance business, and thereafter to coordinate its course to and with the action of the direct writing insurance companies, the said defendant undertook to and did return into the State of Mississippi for the purpose of doing business and did, as appears by "Exhibit D" hereto, upon the 16th day of March, 1923, declare its desire for and make application to re-enter the State of Mississippi for transacting a fire reinsurance business, under the treaties with direct writing companies writing business in the State of Mississippi, which otherwise the said defendant would have remained unable to do. That thereupon O. Ehmann, acting for and on behalf of defendant asked whether or not it would be sufficient to file in the State of Mississippi with the Commissioner of Insurance for the State of Mississippi an annual

statement for the year ending December 31, 1922 and pay in connection therewith the fees necessary,
91 thereupon, as appears by Exhibit "A-1" upon the 27th day of March, 1923, defendant then and there executed and caused to be delivered in the State of Mississippi a certain power of attorney, which pursuant to the act done by the said defendant was filed at its instance and request in the State of Mississippi, and thereunder defendant constituted said Henery, Commissioner, its lawful attorney in the State of Mississippi, upon whom in said State all processes of law against said corporation might be served, under and in accordance with the provisions of Mississippi law, both then in effect and those thereafter to be passed.

Said defendant further thereby expressly agreed in the State of Mississippi that suit might be brought and did acknowledge the power of said Henery, Commissioner, to receive summons, and did personally file, or cause to be filed, said power of attorney in the State of Mississippi.

Said defendant did further then and there, acting by said Ehmann, certify to the State of Mississippi that Robert C. Wilkerson, as its special agent and attorney in the State of Mississippi and lawfully appointed, was authorized and empowered to accept and receive service of all processes whether mesne or final, in
92 any action or proceeding against said defendant in the State of Mississippi, and said defendant agreed that such service was valid, and waived and relinquished all claim or right or error by reason thereof.

Said Ehmann, acting for said defendant, did deliver in the State of Mississippi by letter annexed hereto as a part hereof, (a) certificate of compliance by said defendant from the New York Insurance Department,

(b) an annual statement as at December 31, 1922, executed and sworn to on the regular blank, (c) certificate of deposit from the New York Insurance Department, (d) appointment of said Wilkerson as local agent, (e) appointment of Insurance Commissioner as attorney, (f) application for admission to do business in Mississippi, and (g) check in payment of license fees imposed by the State of Mississippi aggregating $230.00. That all of these acts were done in the State of Mississippi, and said payment was made in the State of Mississippi, is shown by Exhibit (e).

That thereafter upon July 17, 1923, said defendant likewise delivered to said T. M. Henery, Commissioner, in the City of Jackson a certain return, showing the amount of certain payments made in the State of Mississippi.

That upon February 27, 1924, said defendant
93 did make delivery in the city of Jackson to said Insurance Commissioner of the State of Mississippi of (a) annual statement, (b) annual statement, (b) a statement (c) application for agent's license, (d) a tax statement, and did then and there pay in the State of Mississippi the sum of $229.00 as and for taxes due to the State of Mississippi. And at said time said defendant did recite that there were no taxes by it due on premiums on policies written in the State of Mississippi, because although said defendant had reinsured property situated in Mississippi, yet it had restricted its treaties to companies who had paid said tax upon said premiums and did not deduct the same from their tax reports, and consequently the said defendant represented to the said state that there were no such taxes due by it on that portion of the business done in Mississippi. Copies of said instruments are annexed hereto as Exhibit (f) and made part hereof.

That likewise defendant on February 26, 1925, did deliver in the State of Mississippi and did make payment in the State of Mississippi, that is to say, did deliver the annual statement, a statement and application for an agent's license, a tax statement, and
94 did pay $229.00, and did likewise at the same time a call attention to non liability for premium taxation, for the reason just hereinbefore set forth as to the prior year.

That in addition thereto said defendant caused to be made an abstract of its published statements, as required by law, and then and there caused the same for and on its account, as by law required, to be published in a newspaper in the State of Mississippi, and thereafter did pay, lay out and expend the necessary fees.

V

That likewise during the years 1923, 1924 and 1925 defendant filed complete statements as shown by Exhibits "I", "H" and "G", and during each of said years, as therefrom appears, wrote large lines of reinsurance to and with direct writing companies lawfully admitted to do business in Mississippi, which, but for defendant's qualification in Mississippi, said defendant could not have so done, and that from said business so thus done with said direct writing companies the said defendant received gross premiums of $7,739.10 for the gross business written of $535,666.00, and paid losses aggregating $10,647.16, as "business in the State of
95 Mississippi during 1923", and likewise in 1924, gross risks written aggregating $2,266,256.00, for which it collected premiums aggregating $29,188.26, and paid losses aggregating $16,216.00, all reported as

business in the State of Mississippi during 1924," and likewise reported gross business in 1925 of $4,357,697.00, with gross premiums received of $64,870.58, with gross losses paid of $14,365.51, all as business done in the State of Mississippi.

Plaintiff says that said defendant could not have done said business in the State of Mississippi, as by it reported, with said direct writing companies, except upon condition that said defendant would be subject to suit in Mississippi, and that said direct writing companies would have been authorized to cede to said defendant said business, except said defendant should have so qualified and should have so agreed; and that when said defendant well knew that this was the condition upon which it was authorized to do business, it received said business during 1923, 1924, 1925 and continued to receive said business during 1926, and up to the present time, and that said defendant, thus consenting to the said condition contained under the laws of the
96 State of Mississippi, is now estopped and precluded, and has waived any right of objection, having realized large profits from its said business, and thereunder and thereby, while retaining the same and participating in said business, it cannot now repudiate condition upon which said right so thus to be in Mississippi was obtained.

VI.

And for another and further answer, expressly reserving as aforesaid, unto said motion so made, plaintiff says that there was pending in the United States District Court for the Southern District of New York to be held in the City of New York, a certain suit by this

plaintiff against this defendant, which was in personam in Admiralty, and that the relief therein sought was and continued to be a money judgment on the insurance policy herein sued on. That plaintiff therein made demanded judicially on the same cause of action as is hereunder asserted, and in said suit so thus brought defendant personally appeared and submitted to the jurisdiction of said District Court, and said controversy was then and there being litigated on the merits, and that in said Court said suit was depending between the parties at the time of the pendency in this Court of this cause, and that thereupon while this was so pending,

97 the plaintiff upon the transitory cause of action existing under the said policy of insurance, in manner and form as set out in the declaration, sued the defendant in this action and thereupon in this Court said defendant filed its certain plea of prior suit pending in the District Court of New York, as hereinbefore set out, in said plea averring that this suit so brought ought to be abated and stayed, because of the averment that this plaintiff had theretofore in the District Court of the United States for the Southern District of New York, in the City of New York, State of New York, on the 15th day of November, 1921, impleaded defendant as aforesaid, which said action so pending, defendant averred, and at that time remained pending in said District Court of the United States, undetermined, as would appear by profert thereof, which defendant offers to make. By said plea defendant averred that this plaintiff brought said suit, and that the parties hereto were identical with the parties to said New York suit, and that by said plea defendant prayed for an order staying and suspending this suit until said action in New York should be determined; and plaintiff says in virtue of said

plea so thus filed as election was presented to
98 plaintiff whether to proceed in this cause, or in the District Court of the United States in that cause, and plaintiff says that it elected to proceed in this cause against the defendant, and caused to be dismissed without prejudice, at plaintiff's cost, in virtue of said plea of prior suit pending, the said suit pending in the District Court of the United States in New York, and that thereunder and thereby having been so thus compelled to dismiss said suit in New York, that this defendant by the filing of said plea and by the dismissal of said New York suit is estopped and precluded from in any way making this motion to quash, and if not, then the filing of said plea in this Court is a waiver of said motion to quash, being inconsistent therewith.

VII

And for a further answer, reserving as aforesaid plaintiff says that defendant hath appeared generally in this Court, and so having done, is estopped from relying upon said motion.

VIII

And for another and further answer to said motion, expressly reserving as aforesaid, plaintiff denies that a question of this character can be lawfully by
99 motion raised; and further says that said motion, not being properly sworn to, it cannot be entertained, as the same is wholly irregular.

And that pursuant to due authority conferred by the said defendant, process was served on the resident agent, returnable to this term of this Honorable Court, and

that under the agreement hereinbefore set forth, the said defendant waived expressly all errors in the manner of service, and agreed to be thereby bound.

Therefore, in reply to said motion, plaintiff says that the same was not originally well taken, and should be therefore, overruled, but if originally well taken, defendant is estopped from relying thereon, but if not estopped from relying thereon, then that defendant has waived the said motion by those things hereinbefore set out, and by other acts in open Court done.

Wherefore plaintiff says that the cause should forthwith proceed and said motion be denied.

MIZE & MIZE,
JNO. M. LEE,
GREEN, GREEN & POTTER

100 State of Illinois,
County of Cook,
City of Chicago.

Personally appeared before me, the undersigned Notary Public, John M. Lee, to me personally known, and having been by me first duly sworn, on oath state that he is the attorney for Morris and Company, plaintiff in the above entitled suit, and duly authorized to make this affidavit, and states upon his own knowledge that those things in the foregoing answer stated to be true are true, upon affiant's own personal knowledge, and those things therein stated upon information and belief affiant verily believes to be true, as therein stated, upon his own personal information and belief.

GARNER W. GREEN.

Sworn to and subscribed before me, this 7th day of May, 1927.

LOUISE MELTON,
Notary Public.

Answer filed May 13, 1927.

101 (Title Omitted.)

And now comes plaintiff, Morris & Company, after its demurrer to plaintiff's pleas in abatement has been overruled, and exception taken, and prays leave of the Court to file certain replications to said pleas in abatement, copies of which are annexed hereto and made part hereof, and that plaintiff is advised and believes that it has just grounds to traverse the several motions proposed to be traversed by it, in the several replications hereto annexed, and that the several matters sought to be pleaded by confession and avoidance in the said replications are true in substance and in fact.

Wherefore, plaintiff prays leave to have the annexed replications, with the exhibits filed.

MIZE & MIZE,
JOHN M. LEE,
GREEN, GREEN & POTTER,
Attorneys.

102 State of Mississippi,
County of Hinds,
City of Jackson.

Personally appeared before me, the undersigned authority, the within named Garner W. Green, who having been by me first duly sworn, on oath says: that he is one

of the attorneys for Morris & Co., in the above entitled cause, which is a corporation and which is absent from the State of Mississippi, and makes oath that the matters of fact set forth in the annexed replications are true and correct, as therein set out, in substance and fact.

GARNER W. GREEN.

Sworn to and subscribed before me, this 7th day of May, 1927.

LOUISE MELTON,
Notary Public.

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103 REPLICATIONS.

(Title Omitted.)

Comes plaintiff by attorney, and first saving and reserving all manner of objection and exception heretofore herein had and taken, by leave of the Court first had and obtained, for replication says:

I.

Said Morris and Company, hereinafter called "plaintiff," denies that this Court is without jurisdiction of the person of the defendant, and denies that there was any attempted service of process on said defendant, and denies that said service of process is abortive and void for any reason; and denies that for purposes of this suit the defendant is not a citizen of the State of Mississippi, and denies that for purposes of this suit it is a corporation and citizen of the Kingdom of Denmark.

Plaintiff admits the original contract was
104 executed without the State of Mississippi, but denies that said contract was to be performed wholly without the State of Mississippi, and denies that the cause of action arose without the State of Mississippi. Plaintiff denies that defendant was not doing business in the State of Mississippi at the time this suit was brought, and denies that it was not found within the State of Mississippi, and denies that it was not amendable to service of summons made on it in this case, and denies that it has any rights in the premises, but denies that, if it has such rights, it has not waived the same by a voluntary appearance, or otherwise, and of this plaintiff puts itself upon the country.

II.

And for another and further replication, reserving as aforesaid, leave to file which has been expressly had, plaintiff says that under the statute laws of the State of Mississippi foreign corporations may sue and be sued therein, even though the cause of action sued on did not arise within the State, and that this statutory law, long prior to the action of the defendant hereinafter set out, had become a fixed rule by decisions of the
105 Supreme Court of the State of Mississippi, first announced in 1897 in Pullman Palace Car Company v. Lawrence, and thereafter reaffirmed in 1917 in Vicksburg, Shreveport & Pacific Railway v. Forcheimer, and that this requirement of the State of Mississippi that foreign corporations should so be subject to suit had been many years before defendant's entry into Mississippi a fixed principle of Mississippi jurisprudence; and that well knowing the law of the State of Missis-

sippi, and desiring to do business in the State of Mississippi, in pursuance of and in accordance with the statute law of the State of Mississippi, defendant applied to be admitted to do business in the State of Mississippi, and did as part of said application then and there execute and deliver in the State of Mississippi power of attorney to T. M. Henery, Insurance Commissioner, duly filed by said defendant in the office of the Insurance Commissioner, whereunder and whereby it, the said defendant, did constitute and appoint said Henery and his successors in office its true and lawful attorney, and did contract and agree that process in any legal proceeding might be served upon it by service upon the said T. M. Henery, and that said service would have the same force and effect as if served upon the said Company personally as shown by Exhibit A-1 and that in pursuance thereof thereafter this suit was regu-

106 larly brought in Harrison County, Mississippi, in a Court having jurisdiction, and that said Court thereupon issued its certain process lawfully in said cause then pending by this plaintiff against the Skandinavia Insurance Company, Ltd., and in accordance with law this plaintiff paid the costs requisite to have said service made upon the Insurance Commissioner, aggregating $2.00, and that said service upon said defendant was so made upon the faith of this law in the State of Mississippi, and that thereupon said writ was transmitted to said defendant by the Insurance Commissioner of the State of Mississippi, and received by the said defendant without question; and that in coming into the State of Mississippi the said defendant further contracted and agreed that defendant would appoint Robert C. Wilkerson its local attorney for service in the State of Mississippi, as shown by Exhibit "a-2" here-

to annexed, and that it did contract and agree that service so made upon said local agent, whether mesne or final, in any action against said company in any of the Courts of the State might be made, and did thereby admit and agree that such service so made should be taken and held to be valid and sufficient, the same as if served upon the company personally, and all claims and rights of error by reason of the manner such service were thereunder expressly waived, and that
107 thereunder said plaintiff says that when said writ was so issued and so served and received in accordance with the statutes of the State of Mississippi, the said defendant became bound thereby. Copies of all of said written evidence are annexed and made a part hereof, and this the plaintiff is ready to verify.

III.

And for further replication, expressly saving and reserving as aforesaid, leave to file which is heretofore obtained, said plaintiff says that said defendant by its own voluntary act contracted and agreed that it might be sued within the State of Mississippi, as shown by Exhibit E, D, C, J, and exhibits to the next preceding replication, marked A-1 and A-2, and prayed to be taken as a part hereof; and that having so thus agreed defendant is estopped, and plaintiff ought not to be precluded, and this plaintiff is ready to verify.

IV.

And for another replication, expressly saving and reserving, leave to file which has been expressly had, plaintiff says that at the time of the filing of said plea to the

jurisdiction of the person of said defendant, said defendant made a general entry of appearance by filing to and with said plea to the jurisdiction of the person a plea of former suit pending, which said plea of
108 former suit pending admitted the jurisdiction of this Court, and thereby waived any right to object to the jurisdiction of this Court of the person of the defendant, admitting that there was in this cause a valid suit pending in this Court, and calling for affirmative relief by this Court in virtue thereof, all of which more fully appears by the records pleas in this Court, whereunto reference is hereby made, and the same made a part hereof, but not copied herein to save prolixity; and thereby said plaintiff says it ought not to be precluded, and all of this it is ready to verify.

V.

And for another and further replication, expressly saving and reserving, leave to file which being expressly granted, said plaintiff says that said defendant has herein heretofore filed a certain motion to strike a demurrer interposed by the plaintiff from the files, and that said demurrer was filed on the 21st day of February, 1927, and did not restrict the appearance thereby had to a special appearance, and that thereby a general appearance was entered, and any defect of jurisdiction of the person expressly waived, said motion appearing of record herein. It is not copied, but reference thereto is expressly made; and thereby plaintiff says it ought not to be precluded, and this it is ready to verify.

109 VI.

And for another and further replication, expressly saving and reserving, leave to file which being express-

ly given, said plaintiff says that heretofore the said defendant in this cause filed a motion to strike certain interrogatories therein assumed to be filed by the plaintiff from the files of this Court, and did therein submit to this Court divers arguments in writing in support of its said motion, and that said motion, with that thereunder done, constituted and was a general appearance of the defendant, and by the implication of the jurisdiction of this Court in its behalf waived any defect of jurisdiction over the person of defendant, all as will more fully appear from the record, and thereby plaintiff ought not to be precluded, and this it is ready to verify.

VII.

And for another and further replication, first expressly saving and reserving as aforesaid, leave to file which being expressly given, plaintiff says that under and by virtue of the Code, Section 5068, defendant con-
110 tracted to become subject to all laws of the State of Mississippi applicable to the transaction of business in Mississippi by foreign insurance companies and their agents, and that by said laws of the State of Mississippi, it was then and has been at all times since expressly provided by Section 2953, that a motion to quash a summons of citation of service thereof should constitute and be and an appearance generally of the defendant to the succeeding term of Court, and thereunder and thereby plaintiff says that defendant has entered its appearance, and thereby plaintiff ought not to be precluded from so prosecuting its suit, and this the plaintiff is ready to verify.

VII.

And for another and further replication, leave to file which has been expressly had, and all prior rights reserved as hereinbefore set forth, plaintiff says that defendant filed in this certain cause its certain plea, numbered, 2, which was and in a plea of prior suit pending, and that at the time of the filing of this suit in this Court the plaintiff had heretofore filed in the District Court of the Southern District of New York its certain action in Admiralty on this precise policy here sued on against this precise defendant, and that in said Court in said suit the said defendant was then and there personally present and defending said suit, and that being then and there so present and defending said suit, said suit was proceeding in accordance with the rights of the several parties, and that while so thus proceeding this plaintiff filed suit in this Court, and thereupon in answer to this suit so filed in this Court the said defendant filed its plea of prior suit pending, and averred therein that it, the said defendant, ought not to be heard in this action, but that the same ought to abate and be stayed, because said defendant by said plea said that this plaintiff had theretofore in the Honorable District Court of the United States for the Southern District of New York held in the City of New York in the State of New York on the 15th day of November, 1921, impleaded the said defendant in a personal action in Admiralty for the same cause in the declaration aforesaid above mentioned, and seeking the same relief, viz., a money judgment; and therein set out further that said action is said New York Court still remains depending and undetermined, and that the said plaintiff is the

111

same as the plaintiff in said New York suit, and
112 the defendant is the same defendant as in the New York suit, and that said District Court of the United States, of New York, has and had jurisdiction of the action herein sought as brought by the plaintiff, and prayed that this Honorable Court will make and enter an order that this suit be stayed and suspended and respited until said action so pending as aforesaid in the District Court of the United States for the Southern District of New York should have been determined, and plaintiff says that it then and there by so filing said plea of prior suit pending, the said defendant waived this plea to the jurisdiction of the person of the defendant by invoking the jurisdiction of the Court to stay the said suit. And thereby plaintiff ought not to be precluded and this the plaintiff is ready to verify.

IX.

And for another and further replication, all rights being reserved as aforesaid, and leave to file being expressly had, plaintiff says that heretofore it instituted in the District Court of the Southern District of New York in the City of New York, a certain suit in Admiralty against this defendant for a money judgment, and that after so thus instituting said suit in instituted the said suit now here pending, and that in this said suit now here pending the said plaintiff sued the said
113 defendant in this Court while the said defendant was defending the said suit in the New York Court, and personally subject to jurisdiction, and that upon the service of this cause, the said defendant then and there appeared and filed this second plea and set up that this suit now herein pending ought to be abated

and stayed, because said defendant said that the plaintiff herein theretofore by the District Court of the United States for the Southern District of New York, State of New York, on the 15th day of November, 1921, impleaded the said defendant in a personal action in Admiralty for the same cause of action as is herein set out, seeking a money judgment against defendant, and that said action still remains depending and undetermined, as would appear by a duly authenticated copy, wherefore profert was tendered, and that by said plea said defendant further averred the identity of plaintiff and defendant as parties to said New York litigation, and averred that said New York Court had jurisdiction, and averred that by reason thereof that this Honorable Court should make an order to suspend and respite this action until the said New York Court determined said cause; and that upon the said plaintiff being so confronted with said plea of prior suit pending, the said plaintiff did then and there by virtue thereof dismiss the said
114 suit in said State of New York, and did so dismiss the said suit by reason of the plea so herein filed, and having elected thus to proceed in this suit and dismissed the said New York suit at the instance of the said defendant, the said defendant is estopped from urging the dismissal of this suit; and thereby plaintiff ought not to be precluded, and this the plaintiff is ready to verify.

V

And for another and further replication, leave to file which has been had, with all rights reserved, plaintiff says that defendant cannot enter a plea, setting forth want of jurisdiction of the person of the said defendant,

because plaintiff says that beginning 1857 the statutes of the State of Mississippi expressly provided that corporations which exist by the laws of any other State of the Union, by the acts of Congress, or the laws of any foreign country, may sue in the State of Mississippi by their corporate names, and shall also be liable to be sued or proceeded against by attachment or otherwise, as individual non-resident debtors may be sued or proceeded against, (Code 1857, p. 297, Art. 30), and this has continued to be and is still the law of said State, (Code 1871, Sec. 2416; Code 1880, Sec. 1912; Code 1892, Sec. 849; Code 1906, Sec. 914; Hemingway's Code, Sec. 1088), and in addition, by Section 4023 of Hemingway's Code continuously in effect for many years, that such corporations found doing business in this State shall be subject to suit in Mississippi to the same extent that corporations of the State of Mississippi are subject to suit, whether the cause of action accrued in this State or not.

115

These sections of the law were judicially construed in Pullman Palace Car Co. v. Lawrence, 74 Miss. 782, at the March Term, 1897, of the Supreme Court of the State of Mississippi, which said Court was and is the highest Court of law having jurisdiction in said State, and said construction made all corporations, and especially this defendant, liable to such suit; and this construction was continued in the case of Vicksburg, Shreveport & Pacific Railway Co. v. Porcheimer, 74 So. 419, 113, Miss. 531.

And said defendant, well knowing the law of the State of Mississippi, and the judicial construction uniformly thereon placed, desiring to do business in Mississippi and to reap the benefits therefrom, in pursuance of the law of the State of Mississippi, did upon the 27th

day of March, 1923, make, execute and deliver
116 to the Insurance Commissioner of the State of Mississippi a certain power of attorney, as appears by Exhibit "a" to answer to motion, annexed to said answer, and made part hereof be reference, and which was duly filed in the office of the Insurance Commissioner of the State of Mississippi on the 31st day of March, 1923, whereunder and whereby said defendant appointed T. M. Henery, Insurance Commissioner, it true and lawful attorney in fact, and contracted and agreed that upon said Henery process might be served in any action or legal proceeding against said defendant, and said defendant did agree that any such processes so served upon the said T. M. Henery, as Insurance Commissioner against it, the said Defendant, should have the same force and validity as if served upon the company, and did further make, execute and deliver a certain power of attorney to Robert C. Wilkerson, a resident and citizen of the State of Mississippi, and a local insurance agent therein, whereby said defendant did authorize the said Wilkerson to accept and acknowledge service of process whether mesne or final in any action or proceeding against said company in any of the Courts of the State of Mississippi, and thereunder and thereby said defendant admitted and agree that such service should be taken and held to be valid and sufficient in that behalf, the same as if served upon said company according to the laws and practice of said State
117 or any other State, and that by said instrument said defendant did then and there waive and relinquish all claims or rights of error by reason of the manner of such service so then and there to be made.

After said March 31st, 1923, there was regularly brought in the Circuit Court of Harrison County, Mis-

sissippi, this certain against the said defendant, and in said Court, there regularly issued the process lawfully in said pending suit against said defendant, and in accordance with law this plaintiff paid the costs to the Sheriff of Hinds County requisite and necessary to have said service made upon said Insurance Commissioner of the State of Mississippi, as a service upon the said defendant, in manner and form as said defendant had agreed that said service might be made, and in faith upon such agreement, and that under the power so conferred by said defendant this plaintiff paid, laid out and expended the necessary feed for such service, which otherwise it would not have done, aggregating two dollars, under Section 5031; and that thereupon said Insurance Commissioner did transmit the same to the said defendant in the State of New York, which said process was

118 by the said defendant accepted and received, as appears by Exhibit "b" to Answer to Motion, annexed to said Answer, and made part hereof by reference, and thereafter when said service was so made and delivered said defendant came into Court by its express agreement, and waived and relinquished all errors of every kind and character, and that thereunder this plaintiff caused to be served a writ of the defendant's resident agent, returnable to this term of the Court, and that thereunder and thereby jurisdiction now exists in this Court to hear and determine this cause, and this the plaintiff is ready to verify.

MIZE & MIZE THOMPSON,
GREEN, GREEN & POTTER.

119 REPLICATION TO DEFENDANT'S SECOND PLEA IN ABATEMENT.

(Title Omitted.)

And now comes plaintiff, Morris and Company, and for plea to defendant's second plea in abatement says that said plea should not avail said defendant for the reason that, heretofore, to-wit: on the 22 day of April, 1926, said plaintiff, Morris & Company dismissed without prejudice the said suit mentioned therein, a certified copy of said decree being heretofore attached and prayed to be considered a part hereof as fully as if copied herein, and that the plaintiff is ready to verify.

Wherefore, it prays judgment, etc.

JOHN M. LEE,
MIZE & MIZE,
GREEN, GREEN & POTTER,
Attorneys for plaintiff.

Let the foregoing replications be filed.

E. R. HOLMES,
Judge.

Motion and Replications to Pleas in Abatement. Filed May 13, 1927.

Note: The exhibits referred to in answer of plaintiff to defendant's motion to quash and in the replications filed by plaintiff were introduced in evidence on the trial, as will be shown hereinafter.

120 SPECIAL APPEARANCE AND PLEAS TO JURISDICTION.

(Title Omitted.)

Comes the said Skandinavia Insurance Company, Limited, and appears specially for the purpose of filing the following pleas to the jurisdiction, filed to the second or new count of the complaint of said Plaintiff, added by amendment; and this special appearance is for no other purpose.

(1) And the said Skandinavia Insurance Company, Limited, says and shows to this Honorable Court that this Court is without jurisdiction of the person of it, the said defendant, because the attempted service of process on it was and is abortive and void in the first instance, for that it appears from the declaration filed herein in the first instance by the said plaintiff, that the plaintiff is not a resident of the State of Mississippi but is a Corporation organized and existing under the laws of and is a citizen and resident of the State of Louisiana; that the defendant is not a citizen of

121 the State of Mississippi but is a corporation and citizen and resident of the Kingdom of Denmark; that the contract sued on was made without the State of Mississippi and was to be performed wholly without the State of Mississippi; and that the cause of action, if any there be arose without the State of Mississippi. And defendant avers that it was not doing business in the State of Mississippi at the time that this suit was brought; that the said defendant was not found within the said State; that the defendant was not amenable to the service of summons attempted to be made on it in this case; and that it has not waived its rights in the premises by voluntary appearance or otherwise.

Wherefore defendant prays judgment of the said attempted service of summons, that it be quashed and set aside and that the case be dismissed for want of jurisdiction over the person of this defendant.

(11) And for further plea to the jurisdiction in this behalf, filed to the said second count added by amendment as aforesaid, the Skandinavia Insurance Company, Limited, says and shows to this Honorable Court that the Court is without jurisdiction of the person of it, the said defendant, because the attempted service of process on it was and is abortive and void, for that it
122 appears from the said new count, that the plaintiff is not a resident of the State of Mississippi, but is a corporation organized and existing under the laws of and is a citizen and resident of the State of Louisiana; and that the defendant is not a citizen of the State of Mississippi, but is a corporation and citizen and resident of the Kingdom of Denmark. And defendant avers that the alleged indebtedness, if any exists, accrued without the State of Mississippi and grew out of a contract made without the State of Mississippi and to be performed wholly without the State of Mississippi.

And defendant avers that the defendant was not doing business in the State of Mississippi at the time that this suit was brought; that the defendant was not found in the State of Mississippi; that this defendant was not amendable to the service of summons attempted to be made on it in this case; and that this defendant has not waived its rights in the premises, by voluntary appearance or otherwise.

Wherefore defendant prays judgment of the said attempted service of summons, that it be quashed and set

aside and that the case be dismissed for want of jurisdiction over the person of this defendant.

PILLANS, COWLEY & GRESHAM,
LEATHERS & SYKES,
Attorneys for defendant appearing specially.

123 State of New York,
County of New York.

Before me, the undersigned officer authorized to administer oaths, this day personally appeared August Geberth, who being by me first duly sworn, doth on oath depose and say as follows:

I am Assistant United States Manager of The Skandinavia Insurance Co. and as such had to do with the subject matter of the foregoing styled law suit and the matters out of which it grows. As to the matters and facts averred in the foregoing pleas to the jurisdiction, which are not matters apparent on the record itself but are matters of fact outside of the record, I make oath that such allegations of fact are true.

AUGUST GEBERTH.

Subscribed and sworn to before me this 5th day of April, A. D. 1927.

CLINTON W. BEEBE,
Notary Public, Kings Co. No. 753 Reg. No. 9244. Certificate filed in New York County. New York Co. Clerk's No. 433 Register No. 9395. Commission expires March 30, 1929.

(Seal)

124 No. 52849 Series B.

State of New York,
County of New York, ss.

I, William T. Collins, Clerk of the County of New York, and also Clerk of the Supreme Court in and for said County;

Do hereby certify that said Court is a Court of Record, having by law a seal; that Clinton W. Beebe whose name is subscribed to the annexed certificate of proof of acknowledgment of the annexed instrument was at the time of taking the same a Notary Public acting in and for said County, duly commissioned and sworn, and qualified to act as such; that he has filed in the clerk's Office of the County of New York a certified copy of his appointment and qualification as Notary Public for the County of King with his autograph signature; that as such Notary Public, he was duly authorized by the laws of the State of New York to protest notes; to take and certify depositions; to administer oaths and affirmations; to take affidavits and certify the acknowledgment and proof of deeds and other written instruments for lands, tenements and hereditaments, to be read in evidence or recorded in this state; and further,

125 that I am well acquainted with the handwriting of such Notary Public and verily believe that his signature to such proof or acknowledgment is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at the City of New York, in the County of New York, this the 6 day of April, 1927.

WILLIAM T. COLLINS,
Clerk.

Filed May 17, 1927.

126 DEMURRERS TO PLAINTIFF'S ANSWERS TO DEFENDANT'S MOTION TO QUASH EXCEPT ANSWER NUMBERED VII AND JOINDER OF ISSUE AND SAID ANSWER NUMBERED VII.

(Title Omitted.)

Comes the said defendant, continuing its special appearance for the sole purpose of insisting on its objections to the entertaining by this Honorable Court of jurisdiction to hear and determine the cause attempted to be promoted herein by the plaintiff; and demurs separately and severally to the answers filed herein by the plaintiff to the defendant's motion to quash and set aside the attempted service and to dismiss the cause for want of jurisdiction over the person to the said Skandinavia Insurance Company, Ltd., that is to say: the defendant demurs to the answer numbered "I" and for grounds of demurrer assigns the following:

(a) It neither traverses nor confesses and avoids the allegations of the motion to which it is pleaded.

(b) If it is to be treated as a pleading in confession and avoidance, then it confesses that the movant was not doing business in the state of Mississippi
127 at the time suit was brought, and avers no facts to avoid the conclusion therefrom, that this action is not maintainable.

(c) If the plea be treated as a traverse, then it is unduly prolix and confuses with the traverse many things not properly included in a plea of the general issue.

(d) Apparently the pleading is intended by the pleader to be a statement in detail of facts which the pleader conceives to constitute doing business in Mississippi, and therefore to constitute in law a traverse of the allegations of the motions as to matters resting in pais; which traverse would be and is properly made by joining issues on the motion.

(e) The matters set out in said answer and apparently intended by the pleader to be taken as allegations of facts which the pleader insists constitute doing business in Mississippi, affirmatively show that they constitute nothing more than procuring leave to do business and not the doing of business under and pursuant to that leave.

(f) The authority granted by the Skandianvia Insurance Company, Ltd., to the Insurance Commissioner of the State of Mississippi in law has reference to and applies only to, the service of progress on causes
128 of action arising within the State of Mississippi.

(g) The said answer does not state any reply which is valid in law to the said motion; for that the agreement therein mentioned touching the effect of the service of progress on the Insurance Commissioner of the State of Mississippi, was and is valid and effectual only as to process in litigations arising out of transactions had within the state of Mississippi.

And the defendant demurs to the answer numbered II and for grounds of demurrer assigns separately and severally as fully as if here set out, the grounds of assigned to the answer numbered I.

And defendant demurs to the answer numbered III and for grounds of demurrer assigns the same grounds as those assigned to the answer numbered I, as fully as if the said grounds were in detail set out here anew.

And defendant demurs to the answer numbered IV upon the same grounds separately and severally as assigned to the answer numbered I.

And defendant demurs to plaintiff's answer numbered V, on the same grounds already hereinbefore stated.

129 And defendant demurs to plaintiff's answer numbered VI upon the following grounds:

1. The matters set out in the said answer do not constitute either an unqualified appearance, a waiver of improper service or an estoppel to insist on a want of jurisdiction in the Court.

2. The said answer states no reply to the motion to which it is pleaded for that plaintiff was not obliged to dismiss as the action in New York but was simply put to its election which action to prosecute while the other lay dormant.

3. The filing by the defendant of the plea of lis pendens was neither an appearance, a waiver nor an estoppel.

4. The said answer neither traverses nor confesses and avoids the allegations of the motion to which it is pleaded.

5. If the answer is to be treated as a mere confession and avoidance, then it confesses the facts averred in the motion to which it is pleaded and avers no facts to avoid them.

And defendant demurs to plaintiff's numbered VIII and for grounds of demurrer assigns the same grounds of demurrer heretofore assigned to the answer numbered I.

130 And plaintiff joins issue on the answer numbered VII.

PILLANS, COWLEY & GRESHAM,
LEATHERS & SYKES,
Attorneys for the defendant.

Filed May 23, 1927.

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131 DEMURRERS TO REPLICATIONS TO PLEA TO JURISDICTION.

(Title Omitted.)

Comes the said defendant, and, continuing its special appearance confined to the purpose of respectfully asserting that the Honorable Court is without jurisdiction of the person of this defendant in this cause, demurs to the replications filed herein by the plaintiff to defendant's plea to the jurisdiction; that is to say:

Defendant demurs to the replication numbered I upon the following grounds:

(a) The said replication neither confesses the whole plea to which it is pleaded nor traverses the whole plea to which it is pleaded, but confesses part of the allegations of the plea and traverses other parts.

(b) The said replication is neither a traverse nor a confession and avoidance of the plea to which it is pleaded.

(c) The replication is a departure from the declaration.

132 And defendant demurs to the replication numbered II upon the following grounds:

(a) It is neither traverse nor confesses and avoids the plea.

(b) If it be treated as a plea in confession and avoidance, then it confesses that the defendant was not doing business in the State of Mississippi at the time suit was brought and avers no facts to avoid the conclusion therefrom that this action is not maintainable.

(c) If the replication be treated as a traverse, then it is unduly prolix and confuses with the traverse many things not properly included in a general traverse.

(d) Apparently the replication is intended by the plaintiff to be a statement in detail of matters which the pleader conceives to constitutes a doing of business in Mississippi by the defendant, and, therefore, to constitute in a law a traverse of the allegations of the plea as to matters resting in pais, which traverses would be and is properly made by joining issues on the motion

(e) The matters set out in the said replication and apparently intended by the pleader to be taken as allegations which the pleader insists show a doing
133 of business in Mississippi, as a matter of law affirmatively show that there was nothing more than a procuring of leave to do business, and not a doing business under and pursuant to that leave.

(f) The authority granted by the defendant to the Insurance Commission of the state of Mississippi is applicable only to the service of process on causes of action arising within the state of Mississippi.

(g) The replication does not state any answer in law to the said plea; for that the agreement, in the replication mentioned, touching the effect of the service of process on the Insurance Commissioner of the State of Mississippi, was valid and effectual only as to process issued in litigations arising out of transactions had within the state of Mississippi.

And defendant demurs to replication numbered III and for grounds of demurrer assigns separately and severally as fully as if here set out anew, those grounds of demurrer to replication numbered II that are styled "e," "f," and "g."

And defendant demurs to replication numbered IV, upon the following ground:

134 1. The matters set out in said replication do not constitute either an unqualified appearance a waiver of insufficient service or an estoppel to insist on a want of jurisdiction of the person.

2. It affirmatively appears from the record that the motion to strike mentioned in said replication had naught to do with the merits of the case, if there he had jurisdiction of the person of the defendant, but had solely to do with the contest over the question of jurisdiction vel non.

And defendant demurs to plaintiff's replication numbered VI and for ground of said demurrer says that it affirmatively appears from the motion to strike, mentioned in said replication, and the "diverse arguments in writing in support of the said motion," that the defendant's appearance was made in terms specially for the purpose of making the motion and for no other purpose, and that this is clearly and repeatedly pointed out in the said arguments.

And defendant demurs to plaintiff's replication numbered VII upon the following grounds:

1. It appears from the pleadings in the case that the contract sued on was not made in Mississippi and that none of the matters and things concerned
135 therewith constituted a contracting or doing of business in Mississippi.

2. The statute of the state of Mississippi in said replication mentioned is applicable to curable defects in the service of process and not to an inherent lack of jurisdiction.

3. If the said statute of Mississippi should be construed as apparently insisted by the plaintiff, it would be void, to the extent that such construction would carry it, for that it would deprive a non resident defendant

sued within the State of Mississippi of his right to insist that there was no jurisdiction of the person; and hence would deprive him of the equal protection of the laws, and would deprive him of his property without due process of law.

And defendant demurs to plaintiff's replication numbered VIII upon the following grounds:

1. The matters set out in said replication do not constitute either an unqualified appearance, a waiver of want of proper service, or an estoppel to insist on the want of jurisdiction of the person.

And defendant's demurs to plaintiff's replication IX upon the ground just assigned to replication VIII and on the following ground:

136 2. The said replication confesses the averments of the plea and does not set out any matter that avoids them; for that plaintiff was not obliged to dismiss its action in New York but was simply put to its election which action prosecute while the other lay dormant.

And defendant demurs to plaintiff's replication numbered X and for grounds of demurrer assigns separately and severally the same grounds heretofore assigned to replication number II.

PILLANS, COWLEY & GRESHAM,
LEATHERS & SYKES,
Attorneys for the defendant.

Filed May 23, 1927.

137 ADDITIONAL GROUNDS OF DEMURRER BY DEFENDANT TO CERTAIN ANSWERS TO PLAINTIFF TO DEFENDANTS MOTION TO QUASH.

(Title Omitted.)

Comes the Skandinavia Insurance Company, and continuing its special appearance for the purpose of questioning the jurisdiction of the person of the said defendant, assigns the following additional grounds of demurrer to certain of the answer filed by the plaintiff herein to the defendant's motion to quash, that is to say the defendant assigns the following additional grounds of demurrer to plaintiff's said answer numbered "I."

(h) The said answer does not state any reply which is valid in law; for that the said relied on to make the Skandinavia Insurance Company subject to suit in Mississippi to the same extent as domestic corporations of the State of Mississippi and whether the cause of action accrued within the state of Mississippi or not are opposed to the laws of the United States and are of no avail in an action pending in the Courts of the United States.

And the defendant assigns the following additional ground of demurrer to plaintiff's answer numbered "II":

138 (i) The said answer makes no reply to the said motion to quash for that the statute of the state of Mississippi relied on in the said answer, by which it is declared that a motion to quash shall be

deemed a general appearance to the next term, is applicable only to actions pending in the Courts of the State of Mississippi and has no binding force and effect in actions pending in the Courts of the United States.

(j) The said answer does not state any reply valid in law to the said motion to quash; for that the statute of the state of Mississippi relied on in said answer, declaring that a motion to quash shall be deemed a general appearance to the next term, is opposed to the laws of the United States, and is of no force or effect in the Courts of the United States in actions pending in the said Courts.

PELLANS, COWLEY & GRESHAM,
LEATHERS & SYKES,
Attorneys for the Skandinavia Insurance Company, Ltd., appearing specially and only for the purposes hereinbefore indicated.

Filed June 13, 1927.

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139 ADDITIONAL GROUNDS OF DEMURRER BY DEFENDANT.

(Title Omitted.)

Comes the Skandinavia Insurance Company, Ltd., continuing its special appearance solely for the purpose of questioning the jurisdiction of its person in this proceeding, and for no other purpose, and, so specially ap-

pearing, assigns the following grounds of demurrer in addition to those heretofore assigned to certain replications filed by the plaintiff to the defendant's plea to the jurisdiction; that is to say:

The defendant assigns the following additional grounds to the replication numbered "II":

(h) The replication does not state any answer in law to the said plea for that the statutory law of the State of Mississippi in the said plea mentioned, is of force and effect only as to actions pending in the Courts of the State of Mississippi and has no application to or effect upon causes pending in the Courts of the United States.

140 (i) The said replication does not state any answer in law to the said plea; for that the statutory law of the State of Mississippi, in the said replication mentioned, is as applied to cases pending in the Courts of the United States, in opposition to the laws of the United States touching the jurisdiction of the Courts of the United States, and hence has no force or effect in cases pending in the Courts of the United States.

And defendant assigns the following additional grounds of demurrer to plaintiff's replication numbered "VII" that is to say:

(k) The said replication constitutes in law no reply to the defendant's plea to the jurisdiction, for that the statute of the State of Mississippi therein mentioned, declaring that a motion to quash should constitute a

general appearance to the next term, is of force and effect only as to actions pending in the Courts of the State of Mississippi.

(5) The statute of the State of Mississippi in the said replications mentioned, declaring that a motion to quash should constitute a general appearance to the next term, is opposed to the laws of the United States touching the jurisdiction of the of the person
141 of the defendant in cases pending in the Courts of the United States, and the said statute of the State of Mississippi is of no force and effect in cases pending in the Courts of the United States.

And the defendant assigns the following additional grounds of demurrer to replication numbered "X" that is to say: the defendant assigns the same additional grounds of demurrer to the said replication numbered "X" as the additional grounds of demurrer hereinbefore assigned to replication numbered "II."

PELLAN, COWLEY & GRESHAM,
LEATHERS & SYKES,
Attorneys for Skandinavia Insurance Co., Ltd., appearing specially and solely for the purposes hereinbefore indicated.

Filed June 13, 1927.

142 ORDER ON DEMURRERS OF DEFENDANT

(Title Omitted.)

This cause came on to be heard on this the 8th day of September, 1927, on demurrers filed by the defendant to answers by the plaintiff to defendant's motion to quash the service of process and discharge the defendant; and also on defendant's demurrers to plaintiff's replications to defendant's plea to the jurisdiction and the Court ordered that the answer to the motion to quash and the replications to the plea to the jurisdiction be treated as one, and that the demurrers to the replication to the plea to the jurisdiction be argued and regarded as determinative, and to this the parties consented. And the Court having heard counsel, and having considered the said pleadings, is of opinion that the demurrers to the first replication should be overruled, and that the demurrers to the first replication should be overruled, and that the demurrers to each of the other replications should be sustained.

Where on, it is ordered and adjudged that the defendant's demurrers to the plaintiff's replication Number I are hereby overruled.

143 That defendant's demurrers to replication Number II are hereby sustained.

That the defendant's demurrers to replication Number III are hereby sustained.

That the defendant's demurrers to replication Number IV are hereby sustained.

That the defendant's demurrers to replication Number V are hereby sustained.

That the defendant's demurrers to replication Number VI are hereby sustained.

That the defendant's demurrers to replication Number VII are hereby sustained.

That the defendant's demurrers to replication Number VIII are hereby sustained.

That the defendant's demurrers to replication Number IX are hereby sustained.

That the defendant's demurrers to replication Number X are hereby sustained.

To which action of the Court the plaintiff excepted in open Court, and its exceptions were allowed.

E. R. HOLMES, Judge.

M. R. 6 p. 337.

Filed September 9, 1927.

144 On the question of issue being joined by the plaintiff's Replication Numbered One to the Defendant's plea of jurisdiction, and on the issue joined by the defendant on the answer numbered VII of the plaintiff to the defendant's motion to quash the process, the following proceedings were had:

By Mr. Pillans for the Defendant:

The defendant offers in evidence the deposition of August Geberth, taken in New York City pursuant to

notice given attorneys for plaintiff by attorneys for defendant on May 17, 1926, and deposition being given on May 25, 1926, under the following stipulation:

"Appearances:

Messers. Pillans, Cowley & Gresham, Messers. Bigham, Englar and Jones, (Mr. Detels), for the defendant.

Messers. Mize & Mize, Messers. Barry, Wainwright, Thatcher and Symmers, (Mr. Townsend and Mr. McGarvey) for the plaintiff.

It is stipulated that the testimony may be taken by a stenographer—signing, filing and certification being waived, stenographer's fees to be taxable, all objections except as to the form of the questions to be reserved for the trial."

Said deposition was filed in this cause of February 25, 1927, as shown by filing stamp. By R. L. Todd, Clerk, Geo. P. Money, Deputy, and is as fol-
145 lows, summarized and the objections and exceptions hereinafter stated were taken on the trial of the cause:

AUGUST GERERTH, being first duly sworn, testified:

On direct examination, witness stated that he resides in Yonkers, New York, and his place of business is 18 Maiden Lane, New York City.

That he is connected with the Skandinavia Insurance Company, Limited, of Copenhagen, Denmark, and occupies the position of Assistant United States Manager of

said Company; that he was appointed to that office on August 5, 1924, and has held that position ever since; that his chief duty in that capacity is the supervising the writing of insurance in the United States of the Company.

That the Skandinavia Insurance Company, Limited, has one office in the United States, which office is situated in New York City, and all of the writing of insurance by the company anywhere in the United States comes through that office.

That the Skandinavia Insurance Company, Limited, has had no transactions through Messers. R. C. Wilkerson, Inc., or any one else within the State of Mississippi during the time witness has been assistant United States Manager for the Company.

146 "Q. State whether or not the Skandinavia Insurance Company, Limited, has done any business in the state of Mississippi through either Messers. R. C. Wilkerson, Inc., or anyone else located in Mississippi?

By Mr. Garner W. Green on trial of cause:
Objected to as stating a legal conclusion.

Overruled by the Court—exception taken.

A. They have not transacted any business.

That the Skandinavia Insurance Company, Ltd., was not doing business in the State of Mississippi on April 17, 1925; that the Skandinavia Insurance Company had not done any business within the state of Mississippi prior to April 17, 1925; and has not done any business within the state of Mississippi since April 17, 1925.

That the nature of the business of the Skandinavia Insurance Company, Limited, in the United States of America, throughout the period from the time witness was appointed Assistant United States Manager of said company up to and including the present, is a business of reinsurance—fire reinsurance business; that the Company has not been writing any direct insurance during that period.

That the business of reinsurance is transacted as follows: The reinsurance company takes over surplus lines or participation lines from the direct writing company.

147

Asked, "What does the direct writing company insure?" stated: The direct writing company does business with the insured and issues policies on risks located within the United States.

Plaintiff objects on the ground that that is all in writing.

Overruled—exception.

Witness answers that the direct writing company writes policies on property physically located within the United States fire insurance on houses and contents.

Asked—

"Then what does the Skandinavia Insurance Company, Ltd., reinsure? Witness replied.

"They reinsure direct writing company."

Plaintiff objects to answer as stating conclusion; overruled and plaintiff excepted.

Witness was asked where the contracts of reinsurances were executed, to which plaintiff objected and objection overruled.

That the contracts of reinsurance were executed in the New York office of the Skandinavia Insurance Co., Ltd., or in the office of the ceding company, or both offices. By the ceding company he means the
148 direct writing company.

Plaintiff objects as not material and as being in writing.

Objection sustained.

By the defendant:

"If your Honor please, this testimony was taken on notice in New York on May 25, 1926, and an objection of that character, which is readily curable at once when it was being made, should have been made at the time the testimony was taken and not now."

By the Court:

On the ground that the objection comes too late, the Court will overrule the objection. Plaintiff excepts.

Asked—

"What does the Skandinavia Insurance Company, Ltd., agree to do in such reinsurance contracts or treaties?

A. They agree to reimburse the direct writing company for losses incurred by them on risks reinsured with the Skandinavia Insurance Co., Ltd.

By Counsel for Plaintiff:

That situation is not limited to doing business in the State of Mississippi, and we want to object to that as being contrary to law.

149 Objection sustained because documents speak for themselves.

That properties insured by the direct writing company are located anywhere in the United States; direct writing fire insurance companies which have treaties with the Skandinavia Insurance Company, Ltd., may have issued policies on property physically located in the state of Mississippi.

Under the terms of the reinsurance treaties entered into by the Skandinavia Insurance Company, Ltd., with direct writing companies, the Skandinavia Insurance Co., Ltd., does not select the risk with respect to the physical location of the property; all reinsurance is done under contract, where the reinsurance company has no choice in the matter.

That the Skandinavia Insurance Company, Ltd., has not ever had any transactions of reinsurance with any insurance company which has or had its home office within the state of Mississippi; that the Skandinavia Insurance Company, Ltd., has never had any transaction of reinsurance under or pursuant to the laws of the state of Mississippi.

"Q You stated that some of the direct writing companies which had reinsurance treaties with the Skandin

avia Insurance Company, Ltd., may have issued
150 policies on properties physically located within the State of Mississippi—were any reinsurance transactions with respect to such risks had within the state of Mississippi?

A. No, they are made outside of the state of Mississippi."

That all the Skandinavia Insurance Company, Ltd., did in the state of Mississippi has been the filing of the annual statement with the Insurance Department of the state of Mississippi, reporting such business as was transacted in general by the Skandinavia Insurance Company, Ltd., which means, the general annual statement reporting the risks and reinsured and located within the state of Mississippi; that is the risks written by the direct writing company outside of Mississippi.

That as to the connection between the Skandinavia Insurance Company, Ltd., with Robert C. Wilkerson, Inc., of Vicksburg, Mississippi, he is what is known as a nominal agent, and has no authority to write any business whatsoever. That during the time witness has been connected with said Skandinavia Insurance Co., Ltd., it has had no agent in Mississippi other than Messrs. Robert C. Wilkerson, Inc.

On cross examination witness testified:

(By Mr. Robert Townsend in New York):

That when he speaks of doing business in any state, he means only the signing of the under-writ-
151 ing contracts. That those contracts are signed in New York by the ceding companies; that the two parties to the contract sign. That it is the sign

ing of those contracts that he has in mind when he speaks of doing business. That he does not use the term in any other sense.

That the Skandinavia Insurance Company, Ltd., has the authorization to do business in the state of Mississippi as a reinsuring company; that they are authorized to do business under the law of Mississippi in Mississippi as a reinsuring company. That, however the business is done, they have that authority to do business in Mississippi.

That he thinks it was in 1917 the Skandinavia Insurance Company first obtained that authority, is not sure of the year.

"Q. Then they had such authority at all times material to this action here—that is, from 1917 up to what time?

A. We are still admitted in Mississippi.

Q. You are still admitted in Mississippi?

A. Yes.

Q. And you have been admitted ever since around 1917?

A. Yes; I am not sure of the time.

Q. Certainly, since August 5, 1924, when you became assistant manager?

A. Yes."

152 and continually since that time?

That the Company has filed with the Insurance Commissioner of Mississippi the necessary documents for that authorization, and has complied with the law of Mississippi in all respects, as far as necessary to do business as a reinsurance company.

That, prior to his becoming assistant United States Manager of the Company in August, 1924, he was in the

office of Sumner Ballard, United States Manager of the Skandinavia Insurance Company, Ltd., as chief accountant. That as chief accountant, he did not have anything to do with applications for underwriting authorization in the various states, but these matters have come under his direction only since August 5, 1924.

Asked if it is his best recollection that the company was first licensed to do business in Mississippi around 1917, he replied that that was the time when said Company entered the United States to do business and it had to be licensed in all those states, and Mississippi of course. That Mississippi was simply one of the various states in which they were licensed to do business.

On redirect examination witness stated that the Skandinavia Insurance Company, Ltd., was not admitted to write direct insurance in the state
133 of Mississippi; that the Skandinavia Insurance Company, Limited, never had any transaction or did business of any sort in the state of Mississippi other than file the annual report with the Commissioner and pay taxes and apply for license for nominal agent.

The defendant then ordered in evidence the deposition of Theo Hardy taken by defendant in Vicksburg, Mississippi, on May 27, 1926, pursuant to notice given by attorneys for defendant to attorneys for plaintiff on May 24, 1926. Mr. Palmer Pillans of Pillans, Cowley & Gresham, appearing for the defendant, and Mr. Wm. I. McKay appearing for the plaintiff on taking of said deposition, which was as follows, to wit:

THEO HARDY, being first duly sworn, testified as follows:

On re-direct examination, the witness stated:

That he is of R. C. Wilkerson, Incorporated, and is engaged in the general practice of insurance at Vicksburg, Mississippi, and has been for sixteen and one-half years, and has been with R. Wilkerson, Inc., throughout that period, and engaged in the practice of insurance throughout said period.

That he knows the Skandinavia Insurance Company just by it having used their name as agent; knows there is such company.

154 Asked:

"Q. Some years ago there was quite a bit of debate between the state of Mississippi and foreign insurance companies (I mention that in order to fix a period of time), at that time, I believe a number of companies ceased doing business here and afterwards came back into the state—that is correct, isn't it?

Q. Prior to that time of which I speak had there been any communication had between your office, R. C. Wilkerson, Inc., and the Skandinavia Insurance Company touching representation by you of any character in Mississippi? When I say you, I mean not you individually, but your organization?" to which witness replied that the only business they had had with them was that they received a letter from Metzenbecher & Ballard requesting that they be allowed to designate witness' company as agents for a number of Companies in the state, which, as witness understood, they had to

have in the state when they entered the state to do re-insurance business. That witness' firm told them that was all right, and the Skandinavia was amongst those Companies. Outside of that, witness does not know, they sent them a check for $5,000 for each of the companies, and that is all the correspondence and
155 dealings they had with the Skandinavia Insurance Co.

That, subsequent to that time, there was a withdrawal when all the big companies left the state, and the Skandinavia Ins. Company left the state then and they did not hear anything more from it until the Companies came back in 1923. Then witness company heard from them again during that year, requesting the use of the name of witness' company the same as it had done before, and they told them all right. That exactly the same relationship as before was resumed.

"Q. Now, with reference to the Skandinavia Insurance Company, I understood you to say that the sole communication or connection that you had with them had to do with re-insurance?

A. That was our understanding, yes, sir.

Q. There was no direct insurance writing—or direct risks?

A. Not that I know of."

That, during the entire period of time that that relationship had existed between R. C. Wilkerson, Inc., and the Skandinavia Insurance Company, R. C. Wilkerson, Inc., has never at any time written any business in Mississippi for the Skandinavia Insurance Company. That no agent or representative of R. C. Wilkerson, Inc., has

ever written any contract of insurance of any
156 character either directly or indirectly—either
direct insurance or re-insurance, in Mississippi,
for the Skandinavia Insurance Company.

That re-insurance is insurance which Insurance Companies take out of their liability on certain risks, they insure their excess lines. For instance, when a company writes a policy for $10,000 on a building and the company only carries $2500 of it net, they insure their interest in the other part of it as re-insurance.

"Q. The re-insuring company, then, doesn't insure the original assured but insures the original insurer?

Counsel for Plaintiff:

We object to that. It is not a question of what re-insurance is. It could be in that form or any other form.

The Court:

I will let it go in for what it is worth.

A. That is correct, yes, sir."

That at no time through the period witness' company has represented the Skandinavia Insurance Company has it written even that character of insurance through witness' office, in Mississippi. As far a witness' personal knowledge goes, the Skandinavia Insurance Company has not made any contracts, either direct or re-
insurance, through any office other than wit-
157 ness's office, in Mississippi. That, throughout the period of time witness has been testifying about, they have not been authorized by the Skandinavia Insurance Company to write any insurance, either direct or re-insurance, in Mississippi.

Witness states that he cannot produce the original letter from Metzenbecher & Ballard that he testified about as they burn letters up after thy get about two years old; he recalls its contents fairly accurately. He is thoroughly familiar with the connection between his company and the Skandinavia as testified to be him; that he is the gentlemen of his organization who had personal knowledge of this particular matter.

Objection by Mr. McKay for the plaintiff, on the taking of the deposition, that witness ought to produce either the original or a copy of the communication that he is testifying about as the best evidence.

By Mr. Pillans for the Defendant:

The testimony of the witness shows the original was burned; therefore; the secondary evidence is admissible.

That the condition between witness's organization and the Skandinavia Insurance Company testified to by him existed for some time prior to 1921, and then, from 1921, when the companies all left the state, it ceased to exist until 1923.

158 The companies came back in March, 1923, and some time after that the condition then existed again. That said condition existed in April, 1925, and prior to that time, back to the time that the companies returned into the state, and subsequently to that time, continuously.

So far as witness's knowledge goes, there has been throughout that period no other agent in the state of Mississippi for the Skandinavia Insurance Company than witness' company.

Cross Examination.

By Mr. McKay:

Prior to the time the foreign insurance companies withdrew from the State of Mississippi, witness' company permitted the use of their name as agent for the Skandinavia Insurance Company, which use, as they understood, the Skandinavia Insurance had to have to re-insure in this state, but witness' company had no direct representation with them at all.

"Q. You were their agents for whatever business they wanted to do here, were you not?

A. I presume so, they used our name as agent.

Q. Published your name as their agents—is that necessary?

A. With the Insurance Commissioner, I understand, but I could not tell you that."

159 That they wrote witness' company and requested that they be allowed to use the name of witness' company as their agents. Witness understood at the time that the only business the Skandinavia Insurance Company would be re-insurance business; that they got this from the letter witness firm received from them originally that they wanted to use the name of said company for that purpose. The original letter has long ago been destroyed; witness does not know whether the Skandinavia Insurance Company keeps a record of its letters; does not know if a carbon copy of that letter from said company to witness' company could be obtained.

Asked—

"The fact that they requested you to act as their agent was of course a representation to you that they had been authorized and clothed to do business in the state of Mississippi, was it not?

Objection by Mr. Pillans as asking witness to draw a conclusion.

Witness replied that he did not know the requirement of the Insurance Department of the state as to the Companies doing re-insurance business. That his company has never knowingly or willingly represented a company not authorized to do business in the state of Mississippi.

Asked if the fact that the Skandinavia Insurance Company requested witness company to act as there
160 [their] agent was construed by witness to be a representation that the Skandinavia was authorized and clothed to do business in Mississippi, witness said "No."

"Q. Would you have permitted the use of your name as agent if you had known or thought that they were not authorized to do business in the State of Mississippi?

A. I do not know what you mean—whether you mean to do direct writing or re-insurance.

Q. The kind of business you were asked to do as their agent.

A. I was not asked to do any business, only asked to permit the use of their name."

That this meant, he presumes, that if they were going to write any re-insurance in Mississippi, they would have to have an agent in order to get license to do so. Witness is not positive about that as he is not familiar with the law of writing re-insurance; that witness does not do that class of business.

That witness does not know of his own knowledge whether the Skandinavia Insurance Company did any direct insurance in the state of Mississippi or not; only knows that they did not do any through witness's office; does not known personal knowledge whether re-insurance is the only business that the Skandinavia In-
161 surance Company, Ltd., did; has no information whatever as to when and what kinds, of insurance business the Skandinavia Insurance Company, Ltd., did in Mississippi except through witness' office; all he knows is that the Managers of the Skandinavia Insurance Company, Limited, requested and paid his agency for the use of its name as agents of said Skandinavia Insurance Company. That his relationship existed prior and up to the time the Insurance Companies withdrew from the state of Mississippi in 1921 and was resumed when they came back into the state in 1923, would not swear whether it still exists with reference to the Skandinavia Insurance Company at the present time; as far as he knows the relationship between his company and the Skandinavia Insurance Company as heretofore testified to by him still exists; and so far as he knows and believes the said relationship between his agency and the Skandinavia Insurance Company, Limited, existed throughout April, 1923.

Re-Direct Examination.

In addition to the facts stated on cross examination to the effect that all witness knows is that sometime

prior to 1921 he was requested by the Skandianavia Insurance Company, Limited, to permit the use of the name of witness' agency for re-insurance purposes in the State of Mississippi, and that except during the period when the companies withdrew from the state
162 that condition remained down to the present time and that the condition existed throughout the month of April, 1925, witness states that he also knows that throughout that period Messers. R. C. Wilkerson, Inc., did not write any contract of insurance either direct or reinsurance for the Skandinavia Insurance Company, Limited, within the state of Mississippi.

This was all of said deposition, and the same was certified to by Bertha Anderson, notary public before whom said deposition was taken pursuant to notice annexed, and said certificate was signed and sealed on May 31, 1926, and filed on June 2, 1926, in this cause.

By Counsel for Defendant, Mr. Pillans:

The defendant offers in evidence a stipulation between the parties which has been dictated, but not transcribed, which has to do with the new count added in the amendment. That stipulation agrees that the cause of action in the second count is the same as the cause of action declared on in the first count; the policy of insurance was a policy on cargo written in Buenos Aires, to Cuba, and that the loss out of which the claim grows occurred in Montevideo by fire. That's the defendant's case.

163 Said stipulation is as follows:

STIPULATION.

It is stipulated and agreed by and between S. C. Mize and Green, Green & Potter, for the Plaintiff, and Leathers & Sykes and Pillans, Cowling & Gresham, for the defendant, the counsel for the defendant appearing specially for the purpose of this stipulation, and for no other purpose, as follows:

The cause of action sued on in the second count of Plaintiff's complaint, added by way of amendment, March 29th, 1927, is the same cause of action as that declared on in the first count, to-wit: the demand for money due as for loss of goods insured under a policy of marine insurance issued by defendant to plaintiff in Buenos Aires, in the Argentine Republic, upon cargo to be carried Port of Montevideo, Urguary to the Port of Havana, in Cuba, and that the loss which it is claimed caused a liability under the said policy of insurance occurred in Montevideo.

It is hereby further stipulated that the replications which plaintiff has filed to the defendant's pleas to the jurisdiction to the first count shall be considered as having been filed to the pleas to the jurisdiction of the second; and that defendant's demurrers thereto shall be the same as were filed to the first count.

164 By Mr. Chalmers Potter:

Now comes the Plaintiff and moves the Court to exclude the evidence heretofore offered on behalf of the defendant on the pleas to the jurisdiction, and for cause of said motion assigns the following: That, on March 29, 1927, there was filed an amendment or addi

tional count to plaintiff's declaration, upon which process was issued and served by the United States Marshal upon R. C. Wilkerson, agent of the Skandinavia Insurance Company, said service having been had some time subsequent to March 29, 1927; that the burden of proof in the matter now before the Court is upon the defendant, and the defendant has offered no evidence whatever as to any dealings of the defendant, Skandinavia Insurance Company, had within the state of Mississippi subsequent to the 31st day of May, 1926. The deposition of Mr. Theo Hardy being taken in the city of Vicksburg, Mississippi, the 31st day of May, 1926, and deposition of Mr. August Geberth being taken in the City of New York on the 25th day of May, 1926, and as the defendant has wholly failed to offer any evidence whatsoever to show that the Company was not doing business within the state of Mississippi at the time of the service upon R. C. Wilkerson, agent, during the year 1927, the defendant has, therefore, failed to meet the burden, and the plaintiff moves the Court
165 to exclude the evidence and direct a verdict of the jury for the plaintiff in the case.

By Mr. Pillans, for the Defendant:

Let the motion be well taken and the submission set aside and an opportunity to take the testimony touching the proposition just made by defendant.

By the Court:

Yes, I think myself, if that motion is insisted upon, the matter should be taken from the jury and the defendant be given an opportunity to take further testimony. I thought there was an understanding that this proof was to be used.

By Mr. Pillans:

No, sir, we didn't have any stipulation of that sort. The motion is certainly technically good, and I therefore ask that the submission be set aside on the plea, and leave be given to take the testimony as to the matter intervening between the time.

By the Court:

Let the motion be sustained.

By Mr. Mize:

I think we prefer not to insist upon the motion and go on with the case, because, as I understand it, there is no further proof we can offer on this same
166 proposition than we could have offered at that time.

By Mr. Chalmers Potter:

We withdraw the motion.

By the Court:

Just a mere withdrawal of the motion would not relieve them of the point in the motion, unless there is some agreement upon it. If the proof shows they were not doing business in the state, the withdrawal of the motion would not do any good.

By Mr. Garner W. Green:

We are willing to agree that the witness will swear the same thing now.

By the Court:

I think you had better dictate the stipulation to the stenographer, so as to get the point in the record.

By Mr. Gardner W. Green:

It is admitted by plaintiff that it may be considered that defendant has introduced the same two witnesses

named, and that they have sworn before the jury the same condition set forth in their testimony exists up to the present time.

Thereupon the plaintiff, to sustain the issues on its part, offered evidence as follows:

By Mr. Chalmers Potter:

We now introduce a stipulation had at the last term of the Court, which stipulation is in words and figures as follows:

167 (Title Omitted.)

It is hereby agreed by and between the parties hereto, without any waiver of the entry of special appearance by the defendant, that of W. D. Manar were present and testifying, he would testify in substance that he is the circulation manager of the Clarion Ledger, a daily newspaper published in the city of Jackson, Mississippi, and that the November 11, 1925, issue of said paper contained the following abstract of the condition of said company printed in said paper:

Statement. (Fire)

Skandinavia Insurance Company,
of Copenhagen, Denmark.

Condition December 31st, 1924, as per statement filed:

Capital Stock. Amount of Capital Deposited with N. York Ins. Dept.	$400,000.00
Ledger assets (per balance) Dec. 31st of previous year	3,539,362.17

Income.

Net premium income	$1,735,315.99	
Total investment income	182,696.70	
Miscellaneous income	19,584.05	
Total Income		1,927,596.74

168 Disbursements.

Net amount paid policy holders for losses	$1,354,629.10
Other disbursements	826,823.86
Total disbursements	2,181,452.96

Assets.

Total admitted assets	3,274,882.95

Liabilities.

Total amount of liabilities, except capital	2,175,041.46
Capital, $400,000; surplus, $699,841.49	1,099,841.49
Total liabilities	2,385,658.05

W. MacIntosh, U. S. Manager and Attorney. General agent for service. Insurance Commissioner of Mississippi.

State of Mississippi,
Insurance Department.

I, T. M. Henery, Insurance Commissioner, do hereby certify that the above is a true and correct abstract of the statement of the above company filed with this Department showing the condition of said company on the 31st day of December, 1924.

T. M. HENERY,
Insurance Commissioner.

That the cash books of said Company show that payments were made for publishing similar statements for the years 1923 and 1924.

169 That if E. Ellis, were present and testifying, he would testify that he is the clerk of the insurance Department of the state of Mississippi, and that the Skandinavia Insurance Company, the defendant herein, for the years 1923, 1924, and 1925, sent to the Insurance Department of the State of Mississippi for each of said years the sum of $9.00 for the publication of abstract similar to the abstract set out in the stipulation with regard to witness, Manager, as published in said Daily Clarion Ledger, for November 11, 1925, and that the Insurance Department paid said sum of $9.00 for each of said years to the said Daily Clarion Ledger for publishing the statements above mentioned, which were sent to it by the Skandinavia Insurance Company.

That said abstracts showing the condition of said company for the years in question were mailed by the Skandinavia Insurance Company to the Insurance Department of the state of Mississippi for the years in question.

It is understood that this stipulation does not cut off the right of defendant to object to said evidence on the ground that the same is incompetent, irrelevant and immaterial.

This February 26, A. D. 1927.

PILLANS, COWLING & GRESHAM,
LEATHERS & SYKES,
For Defendant.
GREEN, GREE & POTTER,
JOHN M. LEE,
S. C. MIZE,
Attorneys for Plaintiff.

Dated, 2/26/27.

Filed Sept. 23/1927.

By Mr. Garner W. Green:

In order to bring this down, I will ask to make this current too, because it was entered into at the last term of Court.

By Mr. Pillans:

Yes, sir.

By Mr. Garner Green:

That the same conditions that have been detailed in this certificate of W. D. Manar, and E. Ellis, have continued up to the present time and they would so testify if present.

Plaintiff then offered in evidence letter dated March 16, 1923, to T. M. Henery, signed by O.

Ehmann, Assistant U. S. Manager of Skandinavia Insurance Co., Ltd., being in words and figures as follows, to-wit:

EXHIBIT "D."

Copy (A)

Skandinavia Insurance Company.
Copenhagen, Denmark.

No. 80 Maiden Lane, New York, March 16, 1923.

Hon. T. M. Henery,
Insurance Commissioner,
Jackson, Mississippi.

Dear Sir:

This company being desirous of re-entering the State of Mississippi for the purpose of transacting a fire reinsurance business under treatises with direct writing companies authorized to transact business in your state, we shall consider it a favor if you will be kind enough to advise us whether it will be sufficient for this purpose for us to file with you an annual statement for the year ending December 31, 1922, together with the necessary fees in connection therewith.

Thanking you in anticipation for your advices, we beg to remain,

Yours very respectfully,

(Signed) O. EHMANN,
Ass't. U. S. Manager.

172 The Plaintiff then offered in evidence the certificate of the Skandinavia Insurance Com-

pany, Ltd., signed, sealed and acknowledged by it thru its Assistant U. S. Manager, O. Ehmann, appointing T. M. Henery, Insurance Commissioner, as its agent for process, and certificate of the Skandinavia Insurance Company, Ltd., certifying that R. C. Wilkerson, Vicksburg, Mississippi, was its authorized agent as shown therein, said certificates being marked "Received and filed, March 31, 1923," by the Insurance Department of Mississippi, T. M. Henery, Commissioner, and which said certificates are in words and figures as follows, to-wit:

173 EXHIBIT "A-1."

Certificate of Appointment of Insurance Commissioner as Agent for Process. (B)

Copy.

D.

State of Mississippi,
Insurance Department.

Know all men by these presents:

That the Skandinavia Insurance Company, of the city of Copenhagen and Kingdom of Denmark, desiring to transact business in the State of Mississippi, in conformity with the laws thereof, does hereby make, constitute and appoint T. M. Henery, Insurance Commissioner of the State of Mississippi, and his successor in office, its true and lawful Attorney in and for said State of Mississippi, upon whom all processes of law against said corporation in any action or legal proceeding may be served, subject to and in accordance with all the

provisions of the statutes and laws of said State of Mississippi now in force, and such other acts as may be hereafter amendatory thereof and supplementary thereto; and said Company does hereby expressly agree that any and all lawful processes against it which may be served upon said T. M. Henery, Insurance Commissioner, and his successor, shall be deemed valid personal service upon said company and shall be of the same force and validity as if served upon said company; and this authority shall continue in force and irrevocable so long as any liability of the said company remains outstanding in the said State of Mississippi, whether incurred before or since the making and execution of this instrument.

In witness whereof, the said company, to these presents affixed its corporate seal and caused the same to be subscribed and attested by its Ass't. U. S. Manager at the City of New York in the State of New York, on the 27th day of March, A. D. 1923.

SKANDINAVIA INSURANCE COMPANY,
(Signed) O. EHMARD,
Ass't. U. S. Manager.

State of New York,
County of New York, ss.

On this 27th day of March, A. D. 1923, before me, the subscriber, a Notary Public, duly appointed to take the proof and acknowledgment of deeds and other instruments came O. Ehmann, Ass't. U. S. Manager of the Skandinavia Insurance Company, to me personally known to be the individuals described in and who executed the preceding instrument; and he duly acknowledged the execution of the same; and being by me sworn,

deposeth and saith, that he is the said officers of the Insurance Company aforesaid, and that the seal affixed to the preceding instrument is the corporate seal of said Company; and that said corporate seal and his signatures as such officers were duly affixed and subscribed to the said instrument by the authority and direction of said corporation.

In testimony whereof, I have hereunto set my hand and affixed my official seal, at the City of New York the day and date first above written.

(Signed) LOUIS A. TRUSLOW,
(Seal) Notary Public for
Kings County.

176 EXHIBIT A 2.

Certificate as to Authorization of R. C. Wilkerson as Agent.

State of New York,
City of New York, 1923.

To the Insurance Commissioner of the State of Mississippi:

This is to certify, that the persons named below are the authorized agents for the transaction of the business of fire and tornado re-insurance, at the places named, in the State of Mississippi, during the year 19.., for the Skandinavia Insurance Company of Copenhagen in the Kingdom of Denmark, and you are hereby authorized to issue your Certificate of authority to them for that period. All said agents are bona fide residents of the State of Mississippi.

All such agents are hereby authorized to accept and acknowledge service of all process, whether mesne or final, in any action or proceedings against said Company in any of the Courts of said State of Mississippi; and it is hereby admitted and agreed that such service of process aforesaid shall be taken and held to be valid and sufficient in that belief, the same as if served upon said Company according to the laws and practice of said State, or of any other State; and all claims or right of error by reason of the manner of such service, is hereby expressly waived and relinquished.

177 Certificate will not be issued to firms. Each active member of the firm must hold certificate. Certificates are not transferrable.

SKANDINAVIA INSURANCE COMPANY,
(Signed) O. EHMANN,
Ass't. U. S. Manager.

Please make list alphabetically as to towns.

Copy ("C").

Name of Agent—Robert C. Wilkerson.
Place of Residence—Vicksburg.
County—2774.
Received March 31, 1923. $230.00. No. 651.

Check $.... enclosed herewith in payment of fees, for which kindly favor us with usual voucher.

178 Plaintiff next offered in evidence letter from Skandinavia Insurance Company, Ltd., signed O. Ehmann, Asst. U. S. Manager, of date March 28, 1923, to T. M. Henery, Insurance Commissioner of Mississippi, which in words and figures as follows: to-wit:

EXHIBIT "E."

Copy (D).

Skandinavia Insurance Company.
Copenhagen, Denmark.

No. 80 Maiden Lane, New York, March 28, 1923.

Hon. T. M. Henery,
Insurance Commissioner,
Jackson, Mississippi.

Dear Sir:

We are very much obliged for your favor of March 20th, from which we have duly noted that you will promtly re-admit this company to do a reinsurance business in Mississippi on receipt of the necessary blanks and fees, and we now take pleasure in handing you herewith the following papers:

a. Certificate of Compliance from the New York Insurance Department.

b. Annual Statement, per December 31, 1922, executed and sworn to on the regular Convention blank.

179 c. Certificate of Deposit from the New York Insurance Department.

d. Appointment of Mr. Robert C. Wilkerson of Vicksburg our resident agent, in formal compliance with your law.

e. Appointment of your good self as attorney for the service of process.

f. Application for admission in the State of Mississippi.

g. Check in the amount of $230.00 in payment of license and admission fees, as per bill attached.

This completes all the papers to be filed with your Department with the exception of the extract of statement and with regard to same would that you have inadvertently sent us blanks for a life company. If you will send us the proper blanks for a fire company, we shall immediately execute same and return to you, and hope that pending filing of this statement you will issue our license to do business in your State.

Yours very truly,

(Signed) O. EHMANN,
Ass't. U. S. Manager.

E. B.

180 Plaintiff next offered in evidence letter from Skandinavia Insurance Co., Ltd., dated July 17, 1923, signed Daniel F. Gorden, Assistant U. S. Manager, to T. M. Henery, Insurance Commissioner, Mississippi, as follows:

Copy (E).

United States Branch.
Skandinavia Insurance Company.
Copenhagen, Denmark.

No. 80 Maiden Lane, New York, July 17, 1923.

Hon. T. M. Henery,
Insurance Commissioner,
Jackson, Miss.

Dear Sir:

We are handing you herewith enclosed blank for the return of premiums for taxation purposes, covering the perod from March 1st, 1923, to June 30th, 1923.

Please be advised that this company transacts only the business of re-insurance and on all Mississippi business ceded to our company the direct writing company will assume and pay all taxes.

Yours very truly,

dfg b (Signed) DANIEL F GORDON

181 Plaintiff next offered in evidence tax statement, from the state of Mississippi, showing amount of gross premiums received by Skandinavia Insurance Company, Ltd., of Copenhagen, Denmark, from 1st day of March, 1923, to 31st day of June, 1923, received by the Insurance Department of Mississippi, June 31, 1923, as follows, to wit:

182 The State of Mississippi

Tax Statement Fire Insurance Company

Return of Gross Premiums received by the Skandinavia Insurance Company, Ltd., of Copenhagen, Denmark.

Total Amount of Gross premiums received in the State of Mississippi, from the 1 day of March, 1923, to the 31 day of June, 1923	$
Less Premiums Returned Policy Holders and Cancellations of Policies not taken	$
Less Reinsurance with authorized companies as per list on reverse side	$
Total	$
State Tax of two and three-fourths percent thereon	$

Tax for prevention of incendiary fires, one-fifth of one percent (from fire companies only) ..... $.....
Total Taxes Due ..... $.....

Received June 31, 1923. None.

183 Plaintiff next offered in evidence letter from Skandinavia Insurance Company, Ltd., signed by Daniel F. Gordon, Ass't. U. S. Manager, to T. M. Henery, Insurance Commissioner Mississippi, dated February 27, 1924, which is in words and figures as follows:

EXHIBIT "F"

Copy (G).

United States Branch.
Skandinavia Insurance Company
Copenhagen, Denmark

No. 80 Maiden Lane, New York, February 27, 1924.

Hon. T. M. Henery,
Insurance Commissioner,
Jackson, Mississippi.

Dear Sir:

We take pleasure in handing you herewith in connection with our making application for the renewal of our license for the ensuing year, the following documents as required by you:

1. Annual Statement.

2. Statement.

3. Application for Agent's License.

4. Tax Statement.

5. Check for $229.00 in payment of the enclosed bill, which kindly receipt and return.

184 In connection with the tax statement we beg to point out that this company restricts its transactions to reinsurance exclusively and does not issue any policies whatever. The ceding companies from whom we receive such reinsurance do not deduct the amount of premiums ceded to us from their tax reports and consequently all taxes are paid by such companies.

Wishing the enclosure safely to hand, we are,

Yours very truly,

(Signed) DANIEL F. GORDON,
Ass't. U. S. Manager.

B

Received Mar. 10, 1924, $229.00

Plaintiff next offered in evidence Tax Statement of State of Mississippi showing gross amount of premiums received by the Skandinavia Insurance Company, Ltd., in the State of Mississippi from the 1st day of March, 1923, to December 31, 1923—$7,739.10 sworn to by said company through its assistant manager for the United States, Daniel F. Gordon, which statement is in words and figures as follows, to-wit:

185 The State of Mississippi.

Tax Statement Fire Insurance Company.

Return of Gross Premiums received by the Skandinavia Insurance Company of Copenhagen, Denmark.

Total Amount of Gross Premiums received in the State of Mississippi, from the 1st day of March, 1923, to the 31st day of December, 1923		$ 7,739.10
Less Premiums Returned Policy Holders and Cancellations on Policies not taken	$2,517.95	
Less Reinsurance with authorized companies as per list on reverse side	$2,547.81	5,065.76
Total		$ 2,673.34
State Tax of Two and three-fourths per cent thereon		$.....
Tax for prevention of incendiary fires, one-fifth of one percent		$.....
(From fire companies only)		$.....
Total Taxes Due		$.....

Received Mar. 10, 1924. None.

State of New York,
County of New York.

Be it known, that on this, the .. day of ..... 1924, before me, a Notary Public, duly commissioned and sworn and residing in the City of New York
186 and the County and state aforesaid, personally appeared Daniel F. Gordon of the Ass't. U. S.

Manager of the Skandinavia Insurance Company of Copenhagen, Denmark, who, being duly sworn, deposes and says that the above is a full, true and correct statement of the gross amount of earnings, whether in cash or notes, received by the said insurance company through agents or otherwise in the State of Mississippi, from the 1st day of March, 1923, to the 31st day of December, 1923, without any deduction whatever for commissions expenses, losses, reinsurance, or for any other cause, except for premiums actually returned on canceled policies, and reinsurance placed with authorized companies .....

Sworn to and subscribed before me, this 28th day of February, 1924

LILLIAN B. BRADLEY,
Notary Public.

My commission expires March 30, 1925.

187 Plaintiff next offered in evidence certificate of the Skandinavia Insurance Company, Ltd., to the Insurance Commissioner of the state of Mississippi, appointing R. C. Wilkerson, Inc., of Vicksburg, Mississippi, as its agent, signed by said Skandinavia Insurance Co., Ltd., thru Daniel F. Gordon, Assistant U. S. Manager, and marked, Received March 10, 1924, which is in words and figures as follows, to-wit:

188 State of New York
City of New York.

February 28, 1924.

To the Insurance Comissioner of the State of Mississippi.

This is to certify, that the persons named below are the authorized agents for the transaction of the business

of fire and tornado re-insurance, at the places named, in the State of Mississippi, during the year 19.... for the Skandinavia Insurance Company Insurance Company of Copenhagen, Denmark in the ....., and you are hereby authorized to issue your Certificate of authority to them for that period. All said Agents are Bona Fide residents of the State of Mississippi.

As such agents are hereby authorized to accept and acknowledge service of all process, whether mense or final in any action or proceedings against said Company in any of the Courts of said State of Mississippi; and it is hereby admitted and agreed that such service or process aforesaid shall be taken and held to be valid and sufficient in that belief, the same as if served upon said Company according to the laws and practice of said State, or of any other State; and all claims or right of error by reason of the manner of such service, is hereby expressly waived and relinquished. Certificate will not be issued to firms. Each active member of a firm must hold certificate.

189 Certificates are not transferable.

Please make list alphabetically as to towns

Skandinavia Insurance Company
Daniel F. Gordon,
Asst. U. S. Manager.

Copy (1)

Name of Agent	Place of Residence	County
R. C. Wilkerson, Inc.,	Vicksburg	1062

Received
Mar. 10, 1924
$229.00
#452

Exhibit "A-2"

Check $.... enclosed herewith in payment of fees, for which kindly favor us with usual voucher.

Plaintiff next introduced tax statement from Skandinavia Insurance Company to Insurance Department of Mississippi sworn to by A. Geberth, Assistant U. S. Manager, for year 1924, which is words and figures as follows:

190 State of Mississippi

Copy (J)

State of New York,
County of New York.

Personally appeared before me, a Notary Public in and for the State and County aforesaid, A. GEBERTH, who states that he is Ass't U. S. Manager of Skandinavia Insurance Company of Copenhagen, Denmark, and that said Company accepted from its ceding companies reinsurance on Mississippi business to the amount of $1,548,163, on which the premiums amounted to $21,281.95, during the twelve months period ending December 31st, 1924, and that the said ceding companies have reported these premiums to the Insurance Department of the State of Mississippi and paid the proper amount of taxes thereon.

SKANDINAVIA INSURANCE CO.,
A. GEBERTH,
Ass't U. S. Manager.

Sworn to and subscribed before me, this 26th day of February, 1925.

LOUIS A. TRUSLOW,
Notary Public.

My commission expires March 30, 1927.

	Amount	Premiums
Gross amounts	$2,266,256	$29,188.26
Cancellations	718,093	7,906.31
Net Amounts	1,548,163	21,281.95

191 Plaintiff then introduced another Tax Statement from Skandinavia Insurance Co., Ltd., to the Insurance Department of Mississippi sworn to by A. Geberth, Assistant U. S. Manager, for the year 1924, being the same in substance as the preceding statement.

192 The State of Mississippi

Tax Statement Fire Insurance Company

Return of Gross Premiums received by the Skandinavia Insurance Company of Copenhagen, Denmark.

Total Amount of Gross Premiums received in the State of Mississippi, from the 1st day of January, 1924, to the 31st day of December, 1924	$29,188.26	
Less Premiums returned policy holders and cancellations on Policies not taken	$ 7,906.31	
Less Reinsurance with authorized Companies as per list on reverse side	16,847.72	24,754.03
Total		$.....
State Tax of two and three-fourths per cent thereon		$.....

Tax for preventation of incendiary, one-fifth of one per cent (from fire companies only) ..... $.....
Total Taxes Due ..... $.....

SKANDINAVIA INSURANCE CO.
GEBERTH, Asst. U. S. Manager.

Received
Mar. 16, 1925
None

193 State of New York,
County of New York.

Be it known, that on this, the 26th day of February, 1925, before me, a Notary Public, duly commissioned and sworn and residing in the City of New York, in the County and State aforesaid, personally appeared A. Geberth of the Skandinavia Insurance Company of Copenhagen, Denmark, who, being duly sworn, deposes and says that the above is a full, true and correct statement of the gross amount of earnings, whether in cash or notes, received by the said insurance company through agents or otherwise, in the State of Mississippi, from the 1st day of January, 1925, to the 31st day of December, 1924, without any deduction whatever for commissions, expenses, losses, reinsurance, or for any other cause, except for premiums actually returned on canceled policies, and reinsurance placed with authorized companies ....
.....

Sworn to and subscribed before me, this 26th day of February, 1925.

LOUIS A. TRUMAN,
Notary Public.

My commission expires March 30, 1927.

194 Plaintiff next introduced in evidence a letter from the Skandinavia Insurance Company, Ltd., signed by A. Geberth, Asst. Manager to T. M. Henery, Insurance Commissioner, dated Feb. 26, 1925, which is in words and figures as follows, to-wit:

United States Branch
Skandinavia Insurance Company
Copenhagen, Denmark.

No. 80 Maiden Lane
New York, February 26, 1925.

Copy (L)

Hon. T. M. Henery,
Insurance Commissioner,
Jackson, Mississippi.

Dear Sir:

We take pleasure in handing you herewith in connection with our making application for the renewal of our license for the ensuing year, the following documents as required by you:

1. Annual Statement.

2. Statement.

3. Application for Agent's License.

4. Tax Statement.

5. Check for $22.00 in payment of enclosed bill, which kindly receipt and return.

In connection with the tax statement we beg to point out that this company restricts its transactions to reinsurance exclusively and does not issue any policies whatever. The ceding companies from whom we receive such reinsurances do not deduct the amount of premiums ceded to us from their tax receipts and consequently all taxes are paid by such companies.

Wishing the enclosures safely to hand, we
195 beg to remain

Yours very truly,

(Signed) A. GEBERTH,
B Ass't U. S. Manager.

Plaintiff next ofered in evidence certificate of the Skandinavia Insurance Company, Ltd., to the Insurance Commissioner of Mississippi, certifying the appointment of R. C. Wilkerson, Inc., as agent in Mississippi, stamped Received March 16, 1925, and which certificate is in words and figures as follows, to-wit:

196 EXHIBIT A-2

State of New York,
City of New York.

February 26, 1926.

To the Insurance Commissioner of the State of Mississippi:

This is to certify, that the persons named below are authorized agents for the transaction of the business of fire and tornado reinsurance, at the places named, in the State of Mississippi, during the year 19...., for the Skandinavia Insurance Company of Copenhagen, in the

Kingdom of Denmark, and you are hereby authorized to issue your Certificte of authority to them for that period. All said agents are Bona Fide, residents of the State of Mississippi.

All such agents are hereby authorized to accept and acknowledge service of all process, whether mense or final, in any action or proceedings against said Company in any of the Courts of said State of Mississippi; and it is hereby admitted and agreed that such service of process aforesaid shall be taken and held to be valid and sufficient in that belief, the same as if served upon said Company according to the laws and practice of said State or of any other State; and all claims or right of error by reason of the manner of such service, is hereby expressly waived and relinquished.

Certificate will not be issued to firms. Each active member of a firm must hold certificate.

197 Certificates are not transferable.

Please make list alphabetically as to towns.

Copy (M)

Skandinavia Insurance Company
A. Geberth,
Ass't U. S. Manager.

Name of Agent	Place of Residence	County
R. C. Wilkerson, Inc.,	Vicksburg	5498

Received
March 16, 1925
$229.00
#428

Check $.... enclosed herewith in payment of fees, for which kindly favor us with usual voucher.

198 Plaintiff next offered in evidence letter from Skandinavia Insurance Company, Ltd., signed by Sumner Ballard, United States Manager, addressed to T. M. Henery, Insurance Commissioner, of date April 21, 1925, which letter is in words and figures as follows:

EXHIBIT "B".

United States Branch
Skandinavia Insurance Company
Copenhagen, Denmark.

No. 80 Maiden Lane
New York, April 21st, 1925.

Copy (X)

Hon. T. M. Henery,
Insurance Commissioner,
Jackson, Mississippi.

Dear Sir:

We beg to acknowledge receipt of your favor of the 17th instant together with attached certified copy of summons served on you as Attorney for Service, by the Sheriff of Hinds County, Mississippi.

Yours very respectfully,

Signed SUMNER BALLARD,
United States Manager.

FK K

199 Plaintiff next introduced in evidence letter from the Skandinavia Insurance Company, Ltd., signed by Sumner Ballard, United States Manager, ad-

dressed to T. M. Henery, Insurance Commissioner, Mississippi, dated May 26, 1925, which letter is in words and figures as follows:

EXHIBIT "B".

Skandinavia Insurance Company
Copenhagen, Denmark

No. 80 Maiden Lane
New York, May 26th, 1925.

Copy (O)

Hon. T. M. Henery,
Insurance Commissioner,
Jackson, Mississippi.

Dear Sir:

We beg to acknowledge receipt of your favor of the 23rd instant together with certified copy of summons served on you as Attorney for Service by the Sheriff of Hinds County, Mississippi, which summons was issued on May 21st, 1925.

Yours very truly,
(Signed) SUMNER BALLARD,
United States Manager.

Fk-K

200 Plaintiff next introduced in evidence application of the Skandinavia Insurance Company, Limited, to the Insurance Department of Mississippi for license to do business in the State of Mississippi for the year ending February 28, 1927, sworn to by A. Gebserth, Assistant U. S. Manager, which application is in words and figures as follows, to-wit:

201 EXHIBIT "C".

Application for License Fire Insurance Company.

State of Mississippi,
Insurance Department.

Copy (P)

The Skandinavia Insurance Company of the City of New York, and State of New York by A. Geberth, its Ass't U. S. Manager, does hereby apply for license to do business in the State of Mississippi for the year ending on the 28th day of February, 1927.

And I, A. Geberth, Ass't U. S. Manager, Secretary of said Company, do solemny swear that it, the said Company, hereby accepts in good faith the terms and obligations of the Insurance Laws of said States as a part of the consideration of its license; and that said company will not reinsure any risk or part thereof, taken by it on any property located in Mississippi, with any company not authorized to transact the business of fire insurance in said State except as provided by Sec., 2607, Code 1906. It is understood and agreed that said license, if issued, may be revoked as provided in said law.

SKANDINAVIA INSURANCE COMPANY,
A. GEBERTH, Ass't U. S. Manager.

Sworn to and subscribed before me, this 25 day of February, 1926.

(Signed) LOUIS A. TRUSLOW, Notary Public for Kings County.

(Seal)

202 Plaintiff next introduced in evidence letter from Skandinavia Insurance Company, Ltd., signed A. Geberth, Assistant U. S. Manager, of date February 25, 1926, addressed to T. M. Henery, Insurance Commissioner, of Mississippi, as follows, to-wit.

EXHIBIT "J".

United States Branch
Skandinavia Insurance Company
Copenhagen, Denmark.

No. 80 Maiden Lane
New York, February 25, 1926.

Copy (Q)

Sumner Ballard,
United States Manager.

Hon. T. M. Henery,
Insurance Commissioner,
Jackson, Mississippi.

Dear Sir:

We take pleasure in handing you herewith in connection with our making application for the renewal of our license for the ensuing year, the following documents as required by you:

1. Annual Statement.

2. Statement.

3. Application for License.

4. Tax Statement.

5. Application for Agent's License.

6. Check for $229.00 in payment of fees.

203 receipt of which kindly acknowledge.

In connection with the tax statement, we beg to point out that this company restricts its transactions to reinsurance exclusively and does not issue any policies whatever. The ceding companies from whom we receive such reinsurance do not deduct the amount of premiums ceded to us from their tax reports and consequently all taxes are paid by such companies.

Wishing the inclosure safely in your hands, we beg to remain,

Yours very truly,

(Signed) A. GEBERTH,
Ass't U. S. Manager.

K encls

204 Plaintiff next introduced in evidence certificate from the Skandinavia Insurance Company, Ltd., to the Insurance Commissioner of Mississippi certifying the appointment of R. C. Wilkerson, Inc., of Vicksburg, Mississippi, as its agent in Mississippi during the year 1926, marked received Mar. 3, 1926, and which certificate is in words and figures as follows, to-wit:

205 EXHIBIT "A-2".

State of New York,
City of New York.

Feb., 25, 1926.

To the Insurance Commissioner of the State of Mississippi:

This is to certify, that the persons named below are the authorized agents for the transaction of the business of fire and tornado re-insurance, at the places named, in the State of Mississippi, during the year 1926, for the Skandinavia Insurance Company of ..... in the State of ....., and you are hereby authorized to issue your Certificate of authority to them for that period. All said agents are Bona Fide residents of the State of Mississippi.

All such agents are hereby authorized to accept and acknowledge service of all process, whether mense or final, in any action or proceedings against said Company in any of the Courts of said State of Mississippi; and it is hereby admitted and agreed that such service of process aforesaid shall be taken and held to be valid and sufficient in that belief, the same as if served upon said Company according to the laws and practice of said State, or of any other State; and all claims or right of error by reason of the manner of such service, is hereby expressly waived and relinquished.

Certificate will not be issued to firms. Each active member of a firm must hold certificate. Certificates are not transferable. Please make list alphabetically as to towns.

SKANDINAVIA INSURANCE CO.
..... President.
..... Secretary.
A. GEBERTH,
Ass't U. S. Manager.

Copy (R)

Name of Agent Place of Residence County
R. C. Wilkerson, Inc., Vicksburg 716
Received March 3, 1926, $229.00
#325

Check $.... enclosed herewith in payment of fees, for which kindly favor us with usual voucher.

206 Plaintiff next introduced in evidence Tax Statement from the Skandinavia Insurance Company, Ltd., wherein it shows re-insurance on Mississippi business for the twelve months ending December 31, 1925, in the amount of $2,786,527, on which the premiums amounted to $47,819.57 during said period, together with the tax statement, which statements are sworn to by A. Geberth, Assistant U. S. Manager, and are in words and figures as follows, to-wit:

207 Insurance Department
State of Mississippi

Copy (8)

State of New York,
County of New York.

Personally appeared before me, a Notary Public in and for the State and County aforesaid, A. GEBERTH, who states that he is Ass't U. S. Manager of Skandinavia Insurance Company of Copenhagen, Denmark, and that said company accepted from its ceding companies re-insurance on Mississippi business to the amount of $2,786,527 on which the premiums amounted to $47,819.57, during the twelve months period ending December 31, 1925, and that the said ceding companies have reported

these premiums to the Insurance Department of the State of Mississippi and paid the proper amount of taxes thereon.

SKANDINAVIA INSURANCE CO.,
A. GEBERTH,
Ass't U. S. Manager.

Sworn to and subscribed before me, this 25th day of February, 1926.

(Signed) LOUIS A. TRUSLOW,
Notary Public.

My commission expires March 30, 1927.

	Amount	Premiums
Gross Amounts	$4,357,697	$54,870.58
Cancellations	1,571,170	17,051.01
Net Amounts	2,785,527	47,819.57

208 Copy (T)

The State of Mississippi
Tax Statement Fire Insurance Company
Return of Gross Premiums Received by the Skandinavia Insurance Company of Copenhagen, Denmark.

Total Amount of Gross Premiums received in the State of Mississippi, from the 1 day of January, 1925, to the 31 day of December, 1925	$64,870.58
Less Premiums returned Policy Holders and Cancellations on Policies not taken	$17,015.01

Less reinsurance with authorized companies as per list on reverse side	$17,048.76	$34.099.77
Total		$30,770.81
State Tax of two and three-fourths per cent thereon		$.....
Tax for prevention of incendiary fires, one-fifth of one per cent (from fire companies only) ..		$.....
Total Taxes Due		$.....

SKANDINAVIA INSURANCE CO.,
A. GEBERTH,
Ass't U. S. Manager.

Received Mar. 1926.
None.

State of New York,
County of New York.

Be it known, that on this, the 25th day of February, 1926, before a Notary Public, duly commissioned and sworn and residing in the City of New York, in the County and State aforesaid.

Personally appeared A. Geberth, Ass't U. S.
209 Manager of the Skandinavia Insurance Company of Copenhagen, Denmark, who being duly sworn, deposes and says that the above is a full, true and correct statement of the gross amount of earnings, whether in cash or notes, received by the said insurance company through agents or otherwise, in the State of Mississippi, from the 1st day of January, 1925, to the 31st day of December, 1926, without any deduction for commissions, expenses, losses, reinsurance, or for any other cause, except for premiums actually returned on canceled policies, and reinsurance placed with authorized companies.

Sworn to and subscribed before me, this 25th day of February, 1926.

LOUIS A. TRUSLOW,
Notary Public.

My commission expires March 30th, 1927.

Schedule of re-insurance with authorized companies in the State of Mississippi, from the 1st day of January, 1925, to the 31st day of December, 1925.

Name of Company—Address	Amount	Premiums
Internations Ins. Co.,		
210 N. Y.	251,577	3,458.31
Southern Home Ins. Co.,		
S. C.	77,409	1,064.10
Michigan Millers Mutual, Mich.	560.961	8,705.60
National Union Fire, Pa.	241.776	3,820.75
	$1131.723	$17,048.76

Received Mar. 3, 1926.
None.
Filed May 13, 1927.

211 All of the foregoing documents were introduced in evidence by the Plaintiff under the certificate of T. M. Henery, Insurance Commissioner of Mississippi, of date February 24, 1927, said certificate being as follows:

EXHIBIT "A".

Insurance Department
State of Mississippi
T. M. Henery.
Insurance Commissioner
Jackson, Miss.

I, T. M. Henery, Insurance Commissioner of the State of Mississippi, do hereby certify that the attached and following marked "(A)" to (T), inclusive, are true and correct copies of correspondence and or records of the Skandinavia Insurance Company of Copenhagen, Denmark, and now on file in the Insurance Department of Mississippi.

Witness my signature and seal of office this the 24th day of February, 1927, at Jackson, Mississippi.

T. M. HENERY,
Insurance Commissioner.

And all of its foregoing documents introduced in evidence by plaintiff on trial of the cause also constitute Exhibits to the plaintiff's answer to defendant's motion to quash the return on process on defendant herein, and also as exhibits to the replications filed by plaintiff to defendant's pleas in abatement, and, as such exhibits, were filed, attached together in the order introduced in evidence, under the foregoing certificate, on the 13th day of May, 1927, in this cause, as shown by filing stamp of that date, signed "B. L. Todd, Jr., Clerk, by Geo. P. Money, Deputy."

212

213 By Mr. Chalmers Potter, for the Plaintiff:

Then we introduce the annual statements of the Skandinavia Insurance Company, of Copenhagen, Denmark, for the years 1923, 1924, and 1925, under the certificate of the Insurance Commissioner. All of these are the same, except different amounts for each year.

An abstract or summary of each of said annual statements is as follows, to-wit:

The annual statement of the Skandinavia Insurance Company, Limited, of Copenhagen, in the Kingdom of Denmark made to the Insurance Department of the State of Mississippi for the year ended December 31, 1923, received by said Department May 7, 1924, and copy thereof filed in this cause on May 13, 1927, and offered in evidence by plaintiff, and said copy being certified to by T. M. Henery, Insurance Commissioner, under the seal of his office, in the following words:

Insurance Department,
State of Mississippi.

T. M. Henery, Insurance Commissioner,
Jackson, Mississippi.

214 I, T. M. Henery, Insurance Commissioner of the State of Mississippi, do certify that the attached is a true and correct copy of annual statement as of December 31, 1923, of the Skandinavian Insurance Company of Copenhagen, Denmark, as on file in the Insurance Department of Mississippi.

Witness my signature and seal of office, this 24th day of February, 1927, in the City of Jackson, Mississippi.

T. M. HENERY,
(Seal) Insurance Commissioner.

Shows as follows:

Said annual statement shows date of incorporation home office, Copenhagen, Denmark, that it commenced to do business in the United States in 1917, its officers, its directors or trustees; the amount of its capital stock; its income; its disbursements; its ledger assets; non ledger assets; assets not admitted; its liabilities; its risks and premiums on all business effective on and after January 1, 1921, recapitulation of fire risks and premiums on all business effective on and after January 1, 1921, and on perpetual risks wherever written; recapitulation of gross premiums on all unexpired risks other than fire risks; and general interrogatories and its answers thereto; statement of its business in the State of Mississippi during 1923; underwriting and investment exhibited showing the sources of the increase and decrease in surplus during 1923; its schedule
215 of deposits made with any government, province, state, district, county, municipality, corporation, firm or individual; except regular deposits in banks and trust companies subject to check; Schedule E showing name and location of company and amount recoverable for reinsurance on paid and unpaid losses; Schedule showing all bonds owned by it on December 31, 1923; schedule showing that it owned no stocks on December 31, 1923; summary of its bonds and stocks; schedule showing all bonds and stocks acquired by it during 1923; schedule showing all bonds sold, redeemed or otherwise disposed of during 1923; schedule showing all balances, according to company records carried in each bank or trust company on the last day of each month of the year 1923; and page 9 of said annual statement of said company, which touches the question of doing of business in the State of Mississippi by the Skandinavia Insurance Company, Limited, during the year 1923, is in words and figures as follows, to-wit:

Business in the State of Mississippi During 1923.
Risks Written.

(1) Class.	(2) Gross Risks Written.	(3) Risks Canceled.	(4) Reinsurance in Companies Authorized in Mississippi.	(5) Total Deductions Column 3 Plus Column 4.	(6) Net Risks Written Col. 2 Minus Column 5.
Fire	$462,582	$206,482	$124,452	$330,934	$131,648
Tornado, Windstorm and Cyclone	70,609	34,115	10,947	45,062	25,547
Sprinkler Leakage	2,475	500	593	1,093	1,382
Totals	$535,666	$241,097	$135,992	$377,089	$158,577

121

Premiums Received.

(1) Class.	(2) Gross Premiums on Risks Written.	(3) Return Premiums.	(4) Premiums for Reinsurance in Companies Authorized in Mississippi.	(5) Total Deductions Column 3 Plus Column 4.	(6) Net Premiums Received Column 2 Minus Col. 5.
Fire	$7,194.86	$2,357.64	$2,432.64	$4,790.28	$2,404.58
Motor Vehicles	32.66	0	9.80	9.80	22.86
Tornado, Windstorm and Cyclone	510.78	160.29	105.14	265.43	245.35
Sprinkler Leakage	.80	.02	.23	.25	.55
Totals	$7,739.10	$2,517.95	$2,547.81	$5,065.76	$2,673.34

(1)	(2)	(3)	(4)	(5)	(6)	(7)
217		Deduct Losses on Risks			Deduct Losses on Risks	
	Losses	Reinsured	Net Losses		Reinsured	Net Losses
	Paid	in Companies	Paid		in Authorized	Incurred
Class.	Deducting	Authorized	Column 2	Losses	in Miss.	Column 5
	Salvage.	in Miss.	Minus	Incurred.	Companies.	Minus
			Column 3.			Column 6.
Fire	$8,921.45	$3,203.19	$5,718.62	$11,540.30	$4,138.84	$7,401.40
Tornado, Windstorm & Cyclone	1,725.71	517.72	1,207.99	1,725.71	517.72	1,207.99
Sprinkler Leakage..	0	0	0	.62	.19	
Totals	$10,647.16	$3,729.91	$6,926.25	$13,266.63	$4,656.75	8,609.88

218 State of New York,
County of New York.

Daniel F. Gordon, assistant U. S. Manager of the Skandinavia Insurance Company, U. S. Department, being duly sworn, deposes and says that he is the above described officer of the said company and that on the thirty first day of December last, all the above described assets were the absolute property of the said company free from any liens or claims thereon, except as above stated, and that the foregoing statement, with the schedules and explanations therein contained, annexed or referred to are a full and correct exhibit of all of the assets, liabilities, income and disbursements, and of the condition and affairs of the said company on said 31st day of December, last, and for the year ended on that date, to the best of his information, knowledge and belief.

DANIEL F. GORDON,
Assistant U. S. Manager.

Subscribed and sworn to before me, this 28th day of February, 1924.

LILLIAN B. BRADLEY,
(Seal) Notary Public, Queen's County, No. 3846 certificate filed in New York County, Ny. Co. Clerk's No. 969, Ny. Co. Reg. No. 5044, King's Co. Clk., No. 97, King's Co. Reg. No. 5415. Commission expires March 30, 1929.

219 The Annual Statement of the Skandinavia Insurance Company, Limited, of Copenhagen,

Denmark, made to the Insurance Department of the State of Mississippi, for the year ended December 31, 1924, and copy of which was filed in this cause on May 13, 1927, and offered in evidence by plaintiff as aforesaid, and said copy being certified to by T. M. Henery, Insurance Commissioner of the State of Mississippi, under the seal of his office under date February 24, 1927, as being a true and correct copy of the Annual Statement as of December 31, 1924, of the Skandinavia Insurance Company of Copenhagen, Denmark, as then on file in the Insurance Department of Mississippi, shows all details of its business during the year 1924, the date of its commencing to do business in the United States, in 1917, its officers, directors or trustees, the amount of its capital stock, its income, disbursements, ledger assets and non ledger assets, assets not entitled, its liabilities, its risks and premiums on all business effective after January 1, 1921, amount of its bonds, deposits, of all kinds, and all other information as shown and scheduled in its aforesaid Annual Statement for the year 1923, the reports being similar and covering the same information, except as to differing amounts and totals of items; and page 9 of said Annual Statement for the year 1924 touching the question of the doing business by the Skandinavia Insurance Company, Ltd., in the State of Mississippi during said year 1924, being in words and figures as follows, to-wit:

Business in the State of Mississippi During 1924.

Risks Written.

(1) Class.	(2) Gross Risks Written.	(3) Risks Canceled.	(4) Reinsurance in Companies Authorized in Mississippi.	(5) Total Deductions Column 3 Plus Column 4.	(6) Net Risks Written Column 2 Minus Column 5.
Fire	$1,885,492	$641,669	$1,253,831	$1,895,500	$10,008
Tornado, Windstorm and Cyclone	349,664	71,499	83,449	154,948	194,716
Sprinkler Leakage	31,100	4,925	7,835	12,778	18,322
Totals	$2,266,256	718,093	$1,345,153	$2,035,226	$203,030

Premiums Received.

(1) Class.	(2) Gross Premiums on Risks Written.	(3) Return Premiums.	(4) Premiums for Reinsurance in Companies Authorized in Mississippi.	(5) Total Deductions Column 3 Plus Column 4.	(6) Net Premiums Received Column 2 Minus Column 5.
Fire	$27,029.33	$7,656.83	$16,274.89	$23,931.72	$3,097.61

Tornado, Windstorm and Cyclone	2,144.53	249.36	568.55	817.91	1,326.62
Sprinkler Leakage	14.40	0.12	4.28	4.40	10.00
Totals					

Losses Paid and Losses Incurred.

(1) Class	(2) Losses Paid Deducting Salvage	(3) Deduct Losses on Risks Reinsured in Companies Authorized in Mississippi	(4) Net Losses Paid Column 2 Minus Column 3	(5) Losses Incurred	(6) Deduct Losses on Risks Reinsured in Companies Authorized in Mississippi	(7) Net Losses Incurred Column 5 Minus Column 6
Fire	$15,138.25	$7,652.86	$7,485.39	$18,615.52	$10,293.23	$8,322.29
Tornado, Windstorm & Cyclone	75.62	22.69	52.93	76.37	22.92	53.45
Sprinkler Leakage	2.22	.66	1.56	1.60	.47	1.13
Totals	$15,216.09	$7,672.21	$7,539.88	$18,693.49	$10,316.62	$8,376.87

Continuation of page 9 of Annual Statement of Skandinavia Ins. Co., Ltd. for year 1924.

State of New York,
County of New York.

A. Geberth, Assistant U. S. Manager of the Skandinavia Ins. Co., U. S. Dept., being duly sworn, deposes and says that he is the above described officer of said company, and that on the thirty-first day of December, last, all the above described assets were the absolute property of the said company, free and clear from any liens or claims thereon, except as above stated, and that the foregoing statement with the schedules and explanations therein contained, annexed or referred to, are a full and correct exhibit of all the assets, liabilities, income and disbursements, and of the condition and affairs of the said company on the said thirty first day of December, last, and for year ended on that date, according to the best of his information, knowledge and belief.

SKANDINAVIA INSURANCE CO., U. S. DEPT.
A. GEBERTH,
Asst U. S. Manager.

Subscribed and sworn to before me, this 26th day of February, 1925

(Seal)

LOUIS A. TINSLOW,
Notary Public for King's County. Cert. filed in New York County.

The Annual Statement of the Skandinavia Insurance Company, Limited, of Copenhagen, in the Kingdom of Denmark, made to the Insurance

Department of the State of Mississippi for the year ended December 31, 1925, and copy of which was filed in this cause on May 13, 1927, and offered in evidence by plaintiff, and said copy being certified by T. M. Henery, Insurance Commissioner of the State of Mississippi, under the seal of his office on February 24, 1927, as being a true and correct copy of the Annual Statement as of December 31, 1925, of the Skandinavia Insurance Company of Copenhagen, Denmark, as on file in the Insurance Department of Mississippi, shows the date of incorporation, home office, date of beginning to do business in the United States, in 1917, its officers, directors or trustees, the amount of its capital stock, its income, disbursements, ledger assets, non ledger assets, its liabilities, its risks and premiums on all business effective on and after January 1, 1921, amount of its bonds, deposits, and all other information detailing its business for the year 1925 as set forth and scheduled in its aforesaid Annual Statement for the year 1923, except that the amounts are different for said years; and page 9 of said Annual Statement for the year 1925, touching the question of doing business in the State of Mississippi by the Skandinavia Insurance Company, Limited, is in words and figures as follows, to wit:

Business in the State of Mississippi During 1925.

(1) Class.	(2) Gross Risks Written.	(3) Risks Canceled.	(4) Reinsurance in Companies Authorized in Mississippi.	(5) Total Deductions Column 3 Plus Column 4.	(6) Net Risks Written Col. 2 Minus Column 5.
Fire	$3,909,510	$1,413,572	$1,131,723	$2,545,295	$1,364,215
Tornado, Windstorm and Cyclone	402,770	137,785	0	137,785	264,985
Sprinkler Leakage	45,052	19,813	0	19,813	25,229
Hail	375	0	0	0	375
Totals	$4,357,697	$1,571,170	$1,131,723	$2,702,893	$1,654,804

Premiums Received.

(1) Class.	(2) Gross Premiums on Risks Written.	(3) Return Premiums.	(4) Premiums for Reinsurance in Companies Authorized in Mississippi.	(5) Total Deductions Column 3 Plus Column 4.	(6) Net Premiums Received Col. 2 Minus Column 5.
Fire	$62,614.56	$16,534.10	$17,048.76	$33,582.86	$29,031.70

Tornado, Windstorm and Cyclone	2,236.93	512.51	0	512.51	1,724.42
Hail	.94	0	0	0	0.94
Sprinkler Leakage	18.15	4.40	0	4.40	13.75
Totals	$64,870.58	$17,051.01	$17,048.76	$34,099.77	$30,770.81

Losses Paid and Losses Incurred.

(1)	(2)	(3)	(4)	(5)	(6)	(7)
Class.	Losses Paid Deducting Salvage.	Deduct Losses on Risks Reinsured in Companies Authorized in Miss.	Net Losses Paid Column 2 Minus Column 3.	Losses Incurred.	Deduct Losses on Risks Reinsured in Companies Authorized in Mississippi.	Net Losses Incurred Column 5 Minus Column 6.
Fire	$14,353.22	$11,882.81	$2,470.41	$13,844.50	$12,762.79	$1,081.77
Tornado, Windstorm and Cyclone	12.29	0	12.29	12.34	0.23	12.57
Sprinkler Leakage..	0	0	0	0	0	
Totals	$14,365.51	$11,882.81	$2,482.70	$13,856.90	$12,762.56	$1,094.34

Continuation of page 9 of Statement of Skandinavia Ins. Co.

226 State of New York,
County of New York.

A. Geberth, Assistant U. S. Manager of the Skandinavia Ins. Co. U. S. Department, and says that he is the above described officer of said company, and that on the thirty first day of December, last, all the above described assets were the absolute property of the said company free and clear from any liens or claims thereon, except as above stated, and that the foregoing statement, with the schedules and explanations therein contained annexed or referred to are a full and correct exhibit of all the assets, liabilities, income and disbursements and of the condition and affairs of the said company on the thirty first day of December, last, and for the year ended on that date, according to the best of his information, knowledge and belief.

SKANDINAVIA INSURANCE CO.
(Signed) A. GEBERTH, Asst. U. S. Manager.

Subscribed and sworn to before me, this 25th day of February, 1926.

LOUIS A. TINSLOW,
(Seal) Notary Public for King's County, Ctf. filed in N. Y. County.

227 The foregoing three Annual Statements of the Skandinavia Insurance Company introduced by the plaintiff on the trial of the defendant to quash return of process on it herein, being exhibited thereto as follows:

Annual Statement for the year 1923 was Exhibit "G".
Annual Statement for the year 1924 for Exhibit "H".
Annual Statement for the year 1925 was Exhibit "I".

228 CHALMERS POTTER, being produced and first duly sworn, testified as a witness for the plaintiff, as follows:

During December, of 1920, I think it was, Judge Clayton D. Potter and myself, for and on behalf of the State Revenue Agent, filed suit against all of the insurance companies doing business in the State of Mississippi for violating the anti trust laws of Mississippi. Among these was the Skandinavia Insurance Company, in connection with other companies defendant in that suit in the State of Mississippi, which was not terminated until the last half of 1922 or the first part of 1923; and they hired for that purpose in the State of Mississippi Mr. Bob McLaurin, Mr. Will Watkins, Mr. Bomar Harris, together with Col. Thompson, of Dallas, Texas, and that case was constantly in the Courts and was being defended by those gentlemen, and the Skandinavia Insurance Company was a defendant in that law suit from the last part of 1920 to the last of 1922 or the first part of 1923.

By the Court:

How did you get service on them?

A. Service on the Insurance Commissioner.

Cross examination was waived.

Witness excused.

By Mr. Garner W. Green:

The plaintiff rests.

229 By Mr. Pillans:

The defendant now asks in writing a peremptory instruction for the defendant.

By the Court:

Under the testimony, I do not think that the defendant has been doing business in Mississippi, consequently, the general Mississippi statute with reference to service on agents in transitory does not apply. And, further, I do not think the Mississippi insurance statute with reference to service is applicable to business transacted outside of Mississippi.

I am going to give the peremptory instruction as requested. As stated previously, I think this is a question that should have been passed upon by the Court instead of by the jury, as it is a question of jurisdiction; but as the attorneys on both sides have proceeded on the theory that the plea to the jurisdiction and the traverse have raised an issue of fact to be passed on by the jury, and as the jury have been impaneled and heard the testimony, I will let the case take that course and give a peremptory instruction to the jury to find for the defendant, to which the plaintiff excepts and the exception is allowed.

I will just read the instruction:

230 "The Court charges the jury to find for the defendant"; that is, to find that the defendant was not doing business within the State of Mississippi. The decision would have been the same if the case had been tried before the Court without a jury; that is, I

would find, and do now find, that the defendant, Skandinavia Insurance Company, was not doing business within the State of Mississippi, but had simply been authorized to do business.

And the jury, having received the instruction of the Court, presently returned into Court, the following verdict:

We, the jury, find for the defendant, that it was not doing business within the State of Mississippi."

and thereupon judgment was entered, finally dismissing the cause of action of plaintiff and taxing plaintiff with the costs of the Court; to which action of the Court, the plaintiff then and there excepted, in open Court before the jury retired and the exception was allowed; and, on the 8th day of September, 1927, the plaintiff filed a motion for a new trial, in words and figures as follows, to wit:

231 MOTION FOR NEW TRIAL.

(Title Omitted.)

Comes the plaintiff herein and moves the Court to grant it a new trial, and assigns the following grounds for said motion, to wit:

(1) The Court erred in sustaining the demurrer of the defendant to plaintiff's replications II to X inclusive, and to each of them.

(2) The Court erred in giving a peremptory instruction to the jury to find for the defendant on the issue joined by the plaintiff's traverse to the defendant's plea to the jurisdiction.

(3) The Court erred in abating plaintiff's cause of action and dismissing the suit.

(4) Other causes to be assigned on hearing hereof.

JOHN M. LEE,
GREEN, GREE & POTTER,
MIZE & MIZE & THOMPSON,
Attorneys for Plaintiff.

Filed Sept. 8, 1927.

232 That said motion for a new trial was by the Court overruled, to which action of the Court the plaintiff excepted, which exception was allowed and the Court, upon motion of plaintiff, was granted sixty days in which to perfect and present its bill of exceptions as shown by the following order:

233 ORDER OVERRULING MOTION FOR NEW TRIAL.

(Title Omitted.)

Came on this day this cause to be heard upon plaintiff's motion for a new trial, and the Court having heard and considered the same, and being of opinion that the same should be overruled, it is hereby ordered and adjudged that plaintiff's motion for a new trial be and

the same is hereby overruled, and upon motion by plaintiff, it is hereby granted sixty days in which to perfect and present to this Court its bill of exceptions.

Ordered and adjudged this the 8th day of September, 1927.

E. R. HOLMES, Judge.

Filed Sept. 9, 1927.

234 JUDGMENT DISMISSING CAUSE FOR WANT OF JURISDICTION.

(Title Omitted.)

This cause came on to be heard on this the 8th day of September, 1927, on the plaintiff's traverse to the defendant's pleas to the jurisdiction; and came a jury of good and lawful men, composed of Peter Bellande and eleven others, who having been duly impaneled and sworn, and having heard the evidence in the case, and after having heard the evidence and received the charge of the Court retired to consider of their verdict, and presently returned into open Court the following verdict, to-wit:

"We, the jury, find for the defendant."

It is therefore ordered and adjudged by the Court that the action of plaintiff be abated and the cause dismissed for want of jurisdiction over the person of the defendant, and that the plaintiff be taxed with all costs; for which execution may issue.

E. R. HOLMES, Judge.

Filed Sept. 9, 1927.

235 And now, having tendered this bill of exceptions, plaintiff prays that the same may be received and signed, by Judge Edwin R. Holmes, Judge of District Court aforesaid, and made a part of the record in the above styled cause, which is this day accordingly done, within the time permitted by the order of the Court to prepare and present bill of exceptions, and I am satisfied and so certify that such parts of the testimony of witnesses as are stated in the form of question and answer in this bill of exception should be so stated in order to enable the Appellate Court properly to understand and weigh the testimony of such witnesses.

Signed, ordered, and allowed, this the 4th day of November, 1927.

E. R. HOLMES,
District Judge.

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236 PETITION FOR WRIT OF ERROR.

(Title Omitted.)

Morris & Company, plaintiff in the above entitled cause, feeling itself aggrieved by the judgment of the Court entered in the above entitled cause at the September Term 1927, comes now by its attorneys and petitions the Court for an order allowing this plaintiff to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, under and according to the laws of the United States in this behalf made and provided, and also that an order be made fixing the amount of security which

plaintiff shall give upon said writ of error, and that upon the giving of such security the writ of error be granted.

And your petitioner will ever pray.

JOHN M. LEE,
SIDNEY MIZE,
MARCELLUS GREEN,
CHALMERS POTTER,
GARNER W. GREEN,
Attorneys of record for
Petitioner.

Filed Nov. 21, 1927.

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237 ORDER GRANTING WRIT OF ERROR.

(Title Omitted.)

This day this cause came on to be heard on the petition of Morris and Company, a corporation for the allowance of a writ of error from the judgment of the said District Court rendered in the above styled cause at the September 1927 term of said Court, in favor of said Skandinavia Insurance Company, Ltd., and against said Morris & Company, with assignment of errors therein, it is ordered that a writ of error be and is hereby allowed, to have reviewed in the United States Circuit Court of Appeals for the Fifth Circuit the said judgment theretofore entered herein, and that the amount of the bond for said writ of error be and is fixed at Five Hundred Dollars ($500.00) to be conditioned according to law, with surety, to be approved by the Clerk of said District Court.

E. R. HOLMES, Judge.

Filed Nov. 21, 1927.

238 ASSIGNMENT OF ERROR.

(Title Omitted.)

Now comes the plaintiff and files the following assignment of errors upon which it will rely in the prosecution of writ of error in the above entitled cause.

1. The District Court erred in not taking jurisdiction, and in abating the action of the plaintiff, because,

A. The defendant, Skandinavia Insurance Company, Ltd., consented to be sued in the State of Mississippi in this cause of action, both by the Power of Attorney granted the Insurance Commissioner, and by the Power of Attorney granted the local agent; service being had on both;

B. Because the Skandinavia Insurance Company, Ltd., was doing business in Mississippi at the time of the service of this writ;

2. The District Court erred in giving a peremptory instruction for the defendant, because;

A. Said defendant has consented to be sued;

B. Said defendant was liable to suits by the acts done;

C. Said defendant waived its immunity from suit in this cause by, first, appearing by attorney and
239 not in person, and second, by doing all things as appears by the record herein.

3. The District Court erred in not extending back the defendant's demurrers to the replications to defendant's plea and holding the same insufficient in law.

4. The District Court erred in not allowing the plaintiff to demur to the first plea of the defendant.

5. The District Court erred in not holding that defendant became subject to the jurisdiction of the Court by the interposition of its second plea.

6. The District Court erred in sustaining the demurrers of the defendant to each and everyone of the replications interposed by the plaintiff to the defendant's pleas severally and respectively.

7. The District Court erred in not retaining jurisdiction, and for other reasons to be assigned at the hearing.

Wherefore plaintiff prays the judgment may be reversed and the cause remanded for further proceedings, in accordance with law and justice.

JOHN M. LEE,
SIDNEY MIZE,
MARCELLUS GREEN,
CHALMERS POTTER,
GARNER W. GREEN,
Attorneys for Petitioner.

Filed Nov. 21, 1927.

242 WRIT OF ERROR BOND.

(Title Omitted.)

Know all men by these presents: That we, Morris & Company, a corporation, as principal, and Garner W. Green and Chalmers Potter are held and firmly bound unto the Skandinavia Insurance Company, Ltd., a corporation, defendant, in the above entitled cause, in the sum of Five Hundred ($500.00) Dollars, to be paid to the said Skandinavia Insurance Company, Ltd., its successors and assigns, to which payment well and truly to be made we bind ourselves firmly, jointly and severally.

Sealed and dated this 22nd day of November, 1927.

Whereas, the above plaintiff has sued out a writ of error to the United States Circuit Court of Appeals of the Fifth Circuit, to reverse the judgment in the above entitled cause by the District Court of the United States for the Biloxi Division of the Southern District of Mississippi.

Now, therefore, the condition of this obligation is such that if the above named Morris & Co. shall prosecute said writ of error to effect and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and virtue.

MORRIS & COMPANY,
Principal,
GARNER W. GREEN and
CHALMERS POTTER,
Surety.

The foregoing bond and surety approved this 23rd day of Nov. 1927.

E. R. HOLMES, Judge.

Filed Nov. 23, 1927.

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243 United States of America,
Southern District of Mississippi.

I, R. L. TODD, JR., Clerk of the District Court of the United States for the Southern District of Mississippi do hereby certify that the foregoing 244 pages contains a true and correct transcript of the record in the case of Morris & Company vs. Skandinavia Insurance Company, Ltd., as the same appears of record in my office at Biloxi, Mississippi.

Witness my hand and seal this December 3rd, 1927.

R. L. TODD, JR.,
(Seal) Clerk, U. S. District Court for the Southern District of Mississippi.

Writ of Error and Citation omitted from the printed record, the originals thereof being on file in the office of the Clerk of the U. S. Circuit Court of Appeals.

* * * * * * * * *

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MORRIS AND COMPANY

versus

SKANDINAVIA FIRE INSURANCE COMPANY, LTD.

Whereas, the original record herein sent up had therefrom omitted the additional count filed by the plaintiff to recover, and the process executed thereon upon R. C. Wilkerson, Inc., and also the order allowing certain original documents to be sent to this Court from the Court below,

Now therefore, it is agreed by all parties that said omitted documents may be annexed hereto and forthwith transmitted as a supplemental record to the Clerk of the Circuit Court of Appeals, and that all of said omitted documents, save those to be presented in the original form, shall be printed and constitute a part of the record.

PALMER PILLANS,
PILLANS, CAWLEY & GRESHAM,
JAMES A. LEATHERS,
For Defendant in Error.

MAURICE GREEN,
JOHN M. LEE,
SID. MIZE,
CHALMERS POTTER,
GARNER W. GREEN,
For Plff. in Error.

2 In the District Court of the United States for the Southern Division of the Southern District of Mississippi.

Morris & Company, Plaintiff.

vs.

Skandinavia Insurance Company, Defendant.

Now comes the Plaintiff, Morris & Company, a corporation, organized and existing under the laws of the State of Louisiana, by its attorneys, and amends its declaration herein filed against the Skandinavia Insurance Company, a corporation, organized and existing under the laws of the Kingdom of Denmark, with its home office in the city of Copenhagen, and adds to said declaration a second count, in addition to the first count, which shall remain just as it now is, and for its other and further cause of action, says:

That, heretofore, upon May 23, 1919, the said Insurance Company became and was indebted unto the plaintiff in the sum of Fifty Thousand Dollars ($50,000.00) of United States Gold Money, and being then and there so indebted, did undertake and promise to pay to the said plaintiff, the said sum of $50,000.00 together with interest thereon at the rate of six per cent. per annum from and after said 23 day of May, 1919, until paid and although said plaintiff has often demanded payment of the said sum, so to plaintiff owing by said defendant, the said defendant has wholly failed and refused and still fails and refuses, to pay said sum.

3 Wherefore, plaintiff sues and demands judgment in the sum of $50 000.00 with six per cent. interest thereon from May 23, 1919, until paid.

JNO. M. LEE,
GREEN, GREEN & POTTER,
MIZE, MIZE & THOMPSON,
Attorneys for Plaintiff.

Filed March 29, 1927, B. L. Todd, Jr., Clerk.

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1 United States of America,
Southern Division of the Southern District of Mississippi.

The President of the United States,

To the Marshal of the Southern District of Mississippi: Greeting:

We command you, that without delay, you summon Skandinavia Insurance Company, Limited, a corporation organizesl and existing under the laws of the Kingdom of Denmark, defendant residing in the Western Division of said District and citizens of the Kingdom of Denmark that it be and appear at the District Court of the United States, to be held at the Court room thereof, in the City of Biloxi, Mississippi, in and for the Division of the Southern District of Mississippi on the fourth Monday of May next, to answer Morris & Company, a corporation organized and existing under the laws of the State of Louisiana, United States of America, plaintiff which is a citizen of the State of Louisiana of a plea of trespass on the case on insurance policy issued

to the plaintiff by defendant on, to-wit: July 11, 1918, for $50,000.00 for jerked beef of plaintiff to be carried on the vessel Normandy to Havana for the plaintiff as more fully set out in the declaration of plaintiff on file in the office of the Clerk of said District Court at Biloxi, Miss., hereby referred to. Damages claimed $50,000.00 with 6% interest from May 23, 1919, and that it do file its plea or defense in said Court on or before the said meeting thereof, or judgment will be given against it by default; and have you then and there this writ, and how you have executed the same.

Witness the Honorable E. R. Holmes, Judge of the District Court of the United States and the
5 seal of our said District Court this 4th day of April, 1927.

B. L. TODD, JR., Clerk,
By GEO. P. MONEY, Deputy Clerk.

The following is indorsed on the back of said summons:

Received this writ at Vicksburg, Miss., on the 16th day of April, 1927, and executed the same by handing a true copy hereof to R. C. Wilkerson, representative of the Skandinavia Insurance Co., at Vicksburg, Miss., on the 16th day of April, 1927.

A. P. RUSSELL, U. S. Marshal,
By KARL SCHNEIDER, Deputy.

6 In the District Court of the United States for the Southern District of Mississippi, Biloxi Division.

Morris & Company, a Corporation, Plaintiff,
vs. At Law No. 489.
The Skandinavia Insurance Company, Ltd., Corporation, Defendant.

This day by consent came on to be heard the application of the defendant, the Skandinavia Insurance Company, Ltd., under its special appearance, for an order for the safe keeping, transporting and return of those certain papers described as:

Tax statement or return of the Skandinavia Insurance Company from the 1st day of March, 1923, to the 31st day of December, 1923.

Tax statement or return of the Skandinavia Insurance Company from the 1st day of January, 1924, to the 31st day of December, 1924.

Tax statement or return of the Skandinavia Insurance Company from the 1st day of January, 1925, to the 31st day of December, 1925.

The annual statement of the Skandinavia Insurance Company for the year 1923.

The annual statement of the Skandinavia Insurance Company for the year 1924.

The annual statement of the Skandinavia Insurance Company for the year 1925.

to the Circuit Court of Appeals of the Fifth Circuit; and it is ordered that for the purpose of transmission that said papers be delivered to Palmer Pillans, and that

when and after they shall have been so used in
7 said Circuit Court of Appeals on the trial of the above entitled cause they be returned to this Court by said Pillans.

Ordered by consent this November 21, 1927.

E. B. HOLMES Judge

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8 In the District Court of the United States, Southern Division of the Southern District of Mississippi.

Morris & Company, Plaintiff,

vs.

Skandinavia Insurance Co., Defendant.

I, R. L. TODD, JR., Clerk, United States District Court for the Southern District of Mississippi, do hereby certify that the foregoing six pages contain a true and correct copy of the following original papers as set out in this certificate, as the same appear of record in my office at Biloxi, Mississippi, to-wit:

Certified copy of the additional count to the declaration.

Summons issued thereon and U. S. Marshal's return.

Certified copy of order of Court to forward original papers to U. S. Circuit Court of Appeals for the Fifth Circuit.

Witness my hand and seal of office hereunto affixed at Jackson, in said District, this February 4, 1928.

R. L. TODD, JR.,

(Seal) Clerk, U. S. District Court for the Southern District of Mississippi.

Minute entry of argument and submission April 9, 1928, omitted in printing.

IN UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

No. 5229

MORRIS & COMPANY, Appellant,

versus

SKANDINAVIA INSURANCE COMPANY, LTD., Appellee

Appeal from the District Court of the United States for the Southern District of Mississippi

Before Walker, Bryan and Foster, Circuit Judges

John M. Lee, Sidney Mize, Marcellus Green, Garner W. Green (Chalmers Potter on the brief) for Appellant.

Palmer Pillans, James A. Leathers (Bigham, Englar & Jones; Pillans, Cowley & Gresham; Leathers & Sykes on the brief) for Appellee.

OPINION—Filed June 29, 1928

FOSTER, Circuit Judge:

In April, 1925, appellant, a Louisiana corporation, brought a suit at law in a state court to recover on a policy of marine insurance issued at Buenos Ayres by appellee, a corporation organized under the laws of Denmark, to cover a shipment of jerked beef from Montevideo to Havana, in May, 1918. Service of process was made on the Insurance Commissioner of Mississippi under the provisions of the Mississippi statutes. Later, another service was made on Robert E. Wilkerson, Inc. of Vicksburg, the nominal agent of appellee.

The suit was promptly removed to the district court and appellee filed a motion to quash the service and a plea to the jurisdiction, under the practice in Mississippi, both based on the following grounds: that both parties were non-

residents of Mississippi; that the contract was executed and to be performed out of Mississippi; and that appellee was not doing business in Mississippi.

At the time this suit was filed another suit was pending between the same parties on the same cause of action in New York where appellee has a resident agent. With full reservation of its rights under the motion to quash and plea to the jurisdiction, appellee filed a plea of lis pendens. The suit in New York was dismissed before a hearing in this cause, on which hearing the motion to quash and the plea to the jurisdiction were sustained, a verdict was directed in favor of appellee and the suit was dismissed. Error is assigned to the action of the court in dismissing the suit.

The record shows conclusively the following state of facts. Appellee does only a re-insurance business in the United States and all of this is transacted in New York City, the transactions being between appellee's agent and the original insurer. Appellee has re-insured risks on property situate in Mississippi and in compliance with the laws of Mississippi has appointed the Insurance Commissioner of Mississippi its agent for the purpose of service and has also appointed Wilkerson Inc. its nominal agent but that company has never had any transaction of re-insurance or otherwise for appellee, all business being negotiated and transacted in New York. Also in compliance with the Mississippi law appellee has filed annual statements of its re-insurance of risks on Mississippi property and paid an annual tax based thereon.

We think it is clear appellee was not doing business in Mississippi so as to be subject to suit in that state on a cause of action arising elsewhere. Old Wayne Life Assn. vs. McDonough, 204 U. S. 8; Simon vs. Southern Ry., 236 U. S. 115.

It may be conceded that if the statutes of Mississippi requiring appellee to appoint agents in Mississippi made service on those agents good as to a transitory cause of action arising elsewhere, appellee would be bound thereby, but we find nothing in the laws or jurisprudence of Mississippi going to that extent.

It is also contended by appellant that by removing the case to the district court; by appearing by counsel; and by

subsequently filing the plea of lis pendens, appellee has made a personal appearance and waived any defect of service. Citation of authorities is unnecessary to show that this contention is untenable.

We find no reversible error in the record.

Affirmed.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

JUDGMENT—June 29, 1928

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Mississippi, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the plaintiff in error, Morris & Company, and the sureties on the writ of error bond herein, Garner W. Green and Chalmers Potter, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 22, 1928

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified

copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 33,759. U. S. Circuit Court of Appeals, 5th Circuit. Term No. 450. Morris & Company et al., petitioners, vs. Skandinavia Insurance Company. Petition for writ of certiorari and exhibit thereto. Filed September 18th, 1928. File No. 33,759.

18

Office Supreme Court, U. S.
FILED
SEP 18 1928
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1928.

No. 450

MORRIS & COMPANY, et al.,
Petitioners,

vs.

SKANDINAVIA INSURANCE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF

JOHN M. LEE,
MARCELLUS GREEN,
GARNER WYNN GREEN,
CHALMERS POTTER,
SIDNEY MIZE,
Counsel for Petitioners.

BARNARD & MILLER PRINT, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1928.

No. .....

MORRIS & COMPANY, et al.,

Petitioners,

vs.

SKANDINAVIA INSURANCE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

Morris & Company, a Louisiana corporation (Garner W. Green and Chalmers Potter, sureties on its Writ of Error Bond, join herein), later called "Plaintiff," show:

A.

SUMMARY STATEMENT OF MATTER INVOLVED.

(Italics ours in all cases except when specially noted.)

Plaintiff sued defendant in Circuit Court, Harrison County, Mississippi, on a policy of insurance, issued in Buenos Aires, Argentine, covering a shipment on sailing ship Normandy from River Platte to Havana for $50,000.00 United States gold, totally lost May 23, 1919. (R., 4.)

Process was served on T. M. Henry, insurance commissioner (R., 10) appointed attorney in fact when defendant qualified in Mississippi March 27, 1923. (R., 141.)

Defendant, a Denmark corporation, sought removal therefrom to Federal Court, wherein it filed "pleas and motions" under an assumed special appearance, averring:

> "1. * * * the court is without jurisdiction of the person * * * defendant * * * (as) * * * plaintiff is a non-resident * * * the defendant is not a citizen of * * * Mississippi but a corporation * * * of Denmark; the contract * * * was made without * * * Mississippi and was to be performed wholly without the state * * * Defendant was not doing business in * * * Mississippi at the time this suit was brought * * *; wherefore defendant prays judgment of said attempted service of summons, that it be quashed for want of jurisdiction over the person of this defendant.
>
> "2. And for further plea and motion, this defendant still appearing specially and solely for the purpose of asserting its rights as in these pleas and motions set out, * * * says * * * the same ought to *abate* or be *stayed* * * * because * * * plaintiff heretofore * * * in the * * * District Court of the United States for the Southern District of New York * * *" impleaded defendant thereon.
>
> "Wherefore it prays judgment of the said writ and declaration and that the same may be quashed, or, if the court should be of opinion that the proper relief is not the quashing of the writ but a suspension of the proceeding, * * * that this Honorable Court will * * * order that this suit do stay and be suspended and respited until the said action so pending * * * in the District Court * * * of New York * * * should have been determined."

At the February term, 1927, the following occurred:

"By Mr. Pillans, of counsel for defendant:

"*I am in open court demanding* of the plaintiff to know if it be not a fact *that an action in* * * * New York *has not been since the filing of that plea in this cause dismissed* * * *.

"By Mr. Green:

"That is a fact." (R., 65.)

The court ordered that a demurrer then sought to be filed be not filed and plaintiff be directed to reply.

Plaintiff applied to file a further demurrer; whereupon:

> "This matter coming on to be heard on motion of the plaintiff to be allowed to file another demurrer to the plea of the defendant, * * * and the plaintiff having been directed by the court to reply to the pleas of the defendant, and it further appearing to the court that the suit filed in New York has been disposed of, it is ordered that the motion of the plaintiff to file a demurrer to said pleas be denied, *and upon motion of the defendant*, the plaintiff is hereby ordered to traverse, admit, or otherwise reply to the allegations contained in the *pleas and motion to quash of the defendant*.
>
> "* * * after the parties are at issue thereon, said motion and pleas to be consolidated * * *." (R., 68.)

Issue was taken, jury impaneled, and it appeared that the defendant did only a *re-insurance business* in Mississippi, which aggregated, however, more than $4,000,000.00 (although fully qualified) in one year; premiums aggregating more than $60,000.00. (R., 224.)

Defendant executed a power of attorney on March 27, 1923, thus:

> "Scandinavia Insurance Company, * * * *desiring to transact business in the State of Mississippi*, in conformity with *the laws thereof*, does hereby * * * appoint T. M. Henry, * * * lawful attorney * * * upon whom *all processes of law against said corporation in any action or legal proceeding may be served*, subject to and in accordance with *all the provisions* of the statutes and laws of the said State of Mississippi, and * * * does hereby *expressly agree that any and all lawful processes* against it which may be served upon said T. M. Henry, *shall be deemed valid personal service upon said company* and shall be of the same force and validity as *if served upon said company*; and this authority shall continue in force and irrevocable so long as any liability of the said company remains outstanding in the said State of Mississippi, *whether incurred before* or since the making and execution of this instrument." R., 141.)

The defendant further appointed a resident agent:

> "The persons named below are the authorized agents for the transaction of the business of fire and tornado re-insurance, for the Skandinavia Insurance Company * * * and you are hereby authorized to issue your certificate of authority to them for that period. All said agents are bona fide residents of the State of Mississippi.
>
> "*All such agents are hereby authorized to accept and acknowledge service of all process, whether mesne or final, in any action or proceedings against said company in any of the courts of the said State of Mississippi*, and it is further admitted and agreed that such service or process aforesaid shall be taken and held to be valid and sufficient in that belief, *the same as if served upon said company according to the laws and practice of said state, or of any other state;* and all claims or rights of error by reason of the manner of such service, is hereby expressly waived and relinquished." (R., 142.)

Defendant further showed compliance with Section 5073 Mississippi Code, providing:

> All foreign companies must make "a deposit * * * *in exclusive trust for the benefit and security of all the company's policy holders and creditors in the United States,* * * *"*

The District Court abated the suit because "no business was done in Mississippi" and, in virtue thereof, it held defendant was not suable, and held that while plea of *lis pendens* subordinated defendant's person to court's jurisdiction as a court, Section 523 Hemingway's Mississippi Code (1917), providing:

> "The defendant may plead at the same time as many matters as he may have to the jurisdiction of the court, to the disability of the plaintiff, and in abatement of the writ of declaration; * * *"

destroys this rule of federal jurisdiction.

This decision was affirmed in the Circuit Court of Appeals June 29, 1928.

B.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. Defendant is subject to suit in Mississippi under a foreign insurance policy in a transitory action thereon, accruing May 23, 1919, because

(a) Defendant's contract of qualification in Mississippi, (post dating policy and liability thereon) on March 27, 1923, confers jurisdiction of *all causes of action;* local statutes and decisions being disregarded and the decisions of this court ignored by Court of Appeals.

(b) Qualification equivalent to domestication; and

(c) Even if doing business requisite, the voluntary selection by defendant of that portion of insurance business deemed most advantageous, namely, re-insurance, under a general qualification, was doing business sufficient to subordinate person to local jurisdiction.

2. Plaintiff, a Louisiana corporation, sued defendant, a Denmark corporation, in a Mississippi court having jurisdiction—neither party residing in Mississippi, whereupon defendant became an actor by removing suit from State Court to Federal Court, thereby, voluntarily, under the decisions of this court, defendant waived want of jurisdiction over its person.

3. Contrary to the decisions of this court and the rule in the Fourth Circuit (*Mankin* v. *Bartley*, C. C. A. 255 Fed. 926), while filing plea of former suit pending operated as entry of appearance subjecting defendant's person to federal jurisdiction, the courts below held Section 523 Mississippi Code operative to divest federal jurisdiction.

Wherefore, petitioner prays a writ of certiorari from this Honorable Court directed to the Circuit Court of Appeals for the Fifth Circuit commanding that court to certify and

to send to this court for its review and determination on a day certain therein named a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 5229, *Morris & Company, Plaintiff in Error*, v. *Skandinavia Insurance Company, defendant in Error*, and that said judgment of said court may be reversed and your petitioner have such other and further relief as to this Honorable Court seems meet and just. Therefor petitioner prays.

MORRIS & COMPANY,

By JOHN M. LEE,
MARCELLUS GREEN,
GARNER WYNN GREEN,
CHALMERS POTTER,
SIDNEY MIZE,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1928.

No. .....

MORRIS & COMPANY, et al.,

Petitioners,

vs.

SKANDINAVIA INSURANCE COMPANY,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The opinions of the courts below.

The Opinion in the District Court appears, R., 184, and that in the Court of Appeals R., 204.

II.

Jurisdiction.

1.

The date of the judgment to be reviewed is June 29, 1928. (R., 207.)

2.

Petitioner advances these specific claims:

(a) When respondent qualified in Mississippi on March 27, 1923, (after loss on May 23, 1919), by (1) appointing Insurance Commissioner its agent for service of all process and (2) a local resident agent and (3) otherwise subordinating itself to the jurisdiction of Mississippi by writing reinsurance not permitted save to those doing business that (a) under the statutes of Mississippi, and (b) under the decisions of Mississippi, it was liable to suit in Mississippi on a foreign transitory cause of action antecedently arising where Mississippi had in behalf of such cause of action specifically required of respondent "a deposit * * * in exclusive trust for the benefit and security of all the company's policy holders and creditors in the United States * * *." Section 5073.

(b) After the plaintiff, a Louisiana corporation, sued defendant, a Denmark corporation, in a Mississippi Court, of general jurisdiction, neither party residing in Mississippi, when defendant removed to the local Federal District Court, thereby it became an actor and waived want of personal jurisdiction otherwise existing.

(c) By filing plea of former suit pending, personal appearance was entered; the courts below so declared, but erroneously held jurisdiction of the Federal Court over defendant's person was divested by Section 523, Mississippi Code contrary both to decisions (1) of this court and (2) of *Muskin* v. *Bartley*, (4th C. C. A.) 255 Fed. 466.

3.

Jurisdiction is invoked under Judicial Code, Section 240, as amended by the Act of February 13, 1925, 43 Stat. at L. 938, Section 347 U. S. Code Ann.

4.

Jurisdiction sustained by *Forsythe* v. *Hammond*, 166 U. S. 506, 41 L. ed. 1095, *Hamilton Brown Shoe Co.* v. *Wolf Bros. Co.*, 240 U. S. 251, 60 L. ed. 629, in this, that

(a) Decisions of this court vouchsafing operation to qualification statutes and decisions conferring local jurisdiction thereover, entirely ignored;

(b) Decisions of this court defining effect of removal where both parties are non-resident, specifically ignored;

(c) Further decisions of this court declaring Federal jurisdiction independent of local State statutes ignored and a contrary rule is assumed to be established in the Fifth Circuit, from that prevailing in the Fourth Circuit where a statute similar held not operative to alter Federal jurisdiction.

III.

STATEMENT OF THE CASE.

Reference is respectfully made to "A Summary Statement of Matter Involved," *supra*, in the Petition for Certiorari.

IV.

SPECIFICATION OF ERROR.

SPECIFICATION No. 1.

1. The court erred in holding, in a suit for a loss occurring May 23, 1919 on sailing ship Normandy, that defendant, a foreign insurance corporation, who qualified in Mississippi March 27, 1923, and

(a) Who had specifically made a deposit under Sec. 5073, Hem. Code 1917,

> ... * * * of a sum not less than the capital required of like companies under this chapter * * * in exclusive trust for the benefit and security of *all the company's policy-holders and creditors in the United States*";

(b) who had executed on March 27, 1923, a power of attorney quoted *supra* to the Insurance Commissioner, as required by Section 5069, Hem. Code, 1917,

> "*Third.* It shall * * * constitute and appoint the Commissioner of Insurance * * * its true and lawful attorney, upon whom *all process* in any action or legal proceeding against it may be served, and therein shall agree that any process against it which may be served upon its said attorney shall be of the same force and validity as *if served on the Company;*"

and

(c) who had executed a power of attorney to a resident agent, quoted *supra*, as required by Section 4 thereof;

> "*Fourth.* It shall appoint as its agent in this State some resident or residents thereof other than the said Commissioner, signed by the president and secretary or manager or general agent, and filed in the office of the Commissioner, authorizing the agent to acknowledge service of process for and on behalf of the company, and consenting that service of process on the agent *shall be as valid as if served upon the company*, according to the laws of this State, and waiving all claim of error by reason of such service,"

was not subject to suit in Mississippi on an insurance policy, on which liability had accrued, issued beyond the confines of the State before qualification in Mississippi, under *Pennsylvania Fire Insurance Company* v. *Gold Issue Mining & Milling Company*, 243 U. S. 93, 61 L. ed. 610, to a resident of Louisiana, a citizen of the United States,

When

(1) Section 5028 of said Code provides:

> "It shall be unlawful for any company to make any contract of insurance upon, or concerning any property or interest * * * in this State * * * or for

any person as insurance agent or insurance broker to make, negotiate, solicit, or in any manner aid in the transaction of such insurance unless and except as authorized under the provisions of this chapter. All contracts of insurance on property, lives or interest in this state, shall be deemed to be made therein," and

(2) Section 5119 provides:

"Foreign fire insurance companies legally authorized to do business in this State through regularly commissioned and licensed agents located in this State, shall not make contracts of fire insurance on property herein, save through such resident agents as are regularly commissioned by them and licensed to write policies of fire insurance in this State," and

(3) The Supreme Court of Mississippi had so held, in pursuance of common law without statute.

New Orleans J. & G. N. R. R. Co. v. *Wallace*, 50 Miss. 244; *Pullman Co.* v. *Laurence*, 74 Miss. 800; *Pool* v. *L. & N. R. R. Co.*, 72 Miss. 287; *N. O. G. N. R. R. Co.* v. *Fortenberry*, 107 Miss. 83; *Shreveport & Pacific R. R. Co.* v. *Forcheimer*, 74 So. 419; *Camden Fire Insurance Co.* v. *Delaney*, 116 So. 744 and then so held in virtue of statutes:

(a) Section 4088:

"Corporations which exist by * * * the laws of any foreign country, may sue in this State by their corporate names, and they shall also be liable to be sued or proceeded against, by attachment or otherwise, *as individual non-resident debtors* may be proceeded against," and

(b) Section 4093:

"Any corporation claiming existence under the laws of * * * any other country foreign to the United States, found doing business in this State, shall be subject to suit here to the same extent that corporations of this State are, *whether the cause of action accrued in this State or not*."

These statutes have been judicially construed as the precise equivalent of the statute construed in the *Gold Issue case*.

Specification No. 2.

The court erred in that it assumed (R., 184) that though qualified to do business in Mississippi, and having executed the instruments recited under the statutes above recited, that the doing of business conditioned service of process on an accrued liability on a previously issued policy; and erred in not holding that by qualification and other acts delineated, *supra*, defendant *quoad* this suit, did not become a local corporation and estopped from claiming immunity.

Specification No. 3.

If Doing Business Conditions, and Qualification is not Domestication, yet Re-Insurance Done is the Doing of Business, *State* v. *Tomlinson*, 129 N. E. 684, under Section 5070, Hemingway's Code 1917, which provides:

> "Whenever an application for license, for renewal of license, or for admission to this State, is made by a company * * * for the transaction of business of fire insurance herein, such company shall, as one of the prerequisites of admission, file a sworn declaration * * *, that it will not reinsure any risk or part thereof taken by it on any property located in Mississippi with any company *not authorized to transact the business of fire insurance in this State* * * *. Reinsurance premiums paid to companies authorized to do business in Mississippi may be deducted from gross premiums in the semi-annual tax returns, when affidavits are furnished from such authorized reinsuring companies that the amounts so deducted are included in their own semi-annual tax returns, and are paid on by the authorized reinsuring company." and

Section 5071 provides:

> "Every fire insurance company now or hereafter admitted shall annually, * * * make a return to the Insurance Commissioner in such form and detail as may be prescribed by him of all reinsurance contracted for or affected by it directly or indirectly, upon property lo-

> cated in Mississippi, * * * and if any company, domestic or foreign, shall directly or indirectly reinsure any risk taken by it on any property located in Mississippi in any company not duly authorized to transact business herein, * * * or it shall refuse or neglect to make the return required by this section, the said commissioner shall revoke its authority to transact business in this State."

By Section 5028 quoted above all contracts are deemed to be made within Mississippi.

Specification No. 4.

Defendant entered a voluntary general appearance when it removed to the District Court this cause, where neither plaintiff nor defendant resided in Mississippi voluntarily waiving personal privilege otherwise existing. *Ex Parte Wisner*, 203 U. S. 449:

Re Moore, 209 U. S. 904, holds:

> " * * * The defendant applied for a removal of the case to the Federal Court. Thereby he is foreclosed from objecting to its jurisdiction." (*Not questioned on this.*)

Rose's Federal Jurisdiction and Procedure, (3rd ed.) 363; *Vaughn* v. *McArthur*, 227 Fed. 367; *Klink* v. *Chicago, R. I. P. Ry. Co.*, 219 Fed. 457 (C. C. A. 8th Cir.).

Specification No. 5.

The court erred in holding that Section 523 Hemingway's Code 1917, which provides:

> "*Several pleas in abatement.*—The defendant may plead at the same time as many matters as he may have to the jurisdiction of the court, to the disability of the plaintiff, and in abatement of the writ or declaration; and he shall set forth the matters in separate pleas, and in plain, intelligible concise language, without regard to technical form."

operative in District Court to divest Federal jurisdiction over the person, voluntarily conferred by filing plea of *lis pendens*.

BRIEF.

POINT I.

Defendant is subject to suit in Mississippi on a policy of insurance issued outside of Mississippi wherein a loss occurred May 23, 1919, when thereafter defendant qualified in Mississippi on March 27, 1928.

(a) DEFENDANT'S CONTRACT CONFERS JURISDICTION UPON THE COURT, IRRESPECTIVE OF THE DOING OF BUSINESS.

Section 5069, Hem. Code; Section 5028, Hem. Code; Section 5119, Hem. Code; Section 5144, Hem. Code; *Insur. Co. v. Hyde*, U. S. Adv. Shts., Jan. 16, 1928, p. 163; *Tyson v. Banton*, 71 L. Ed. 718, 271 U. S. 418; *Insur. Co. v. Lewis*, 233 U. S. 389, 58 L. Ed. 1011; *Insur. Co. v. Yates*, 214 Ill. 272; *Philadelphia & Reading R. Co. v. McKibbin*, 243 U. S. 264; *Penn. Fire Insur. Co. v. Gold Issue, etc.*, 243 U. S. 93; *Robt. Mitchell Furn. Co. v. Constr. Co.*, 257 U. S. 213; *Blake v. McClung*, 172 U. S. 239; *Compania Gen. de Tobaccos v. Collector, etc.*, 275 U. S. 87; *N. O. J. & G. N. R. R. Co. v. Wallace*, 50 Miss. 244; *Paul v. L. & N. R. R.*, 72 Miss. 287; *Pullman Co. v. Lawrence*, 74 Miss. 800; *Vicksburg, S. & P. R. R. v. Forcheimer*, 74 Sou. 419; *Fidelity, etc., Co. v. Cross*, 89 Sou. (Miss.) 780; *Contin. Cas. Co. v. Gilmer*, 111 Sou. (Miss.) 741; *Nat'l. Surety Co. v. Holmes County*, 120 Miss. 706; *Globe Rutgers Ins. Co. v. Sale*, 107 Miss. 169; Section 4088, Hem. Code; Section 4093, Hem. Code; *Penn. Fire Insur. Co.*, 267 Mo. 524, 184 S. W. 999; *State ex rel Grim*, 239 Mo. 135, 143 S. W. 432; *Marqueze et al. v. Caldwell*, 48 Miss.
23 91; *Johnson v. Trade Ins. Co.*, 132 Mass. 432; *Mooney v. Buford*, 72 Fed. 32; *Wilson v. Fire Alarm*, 149 Mass. 24,

20 N. E. 318; *Reynolds* v. *M. K. & T. Ry. Co.*, 117 N. E. (Mass.) 913; *Bagdon* v. *Philadelphia & Reading Coal, etc., Co.*, 217 N. Y. 432; *Smolik* v. *Philadelphia & Reading, etc., Co.*, 222 Fed. 148; *Bloom* v. *Iron Novelty Corp.*, 219 N. Y. S. 93; *State ex rel. Goldwyn, etc.*, v. *Gehrz*, 194 N. W. 418; *Reeves* v. *Sou. Ry. Co.*, 121 Ga. 561; *Lipe* v. *Railway Co.*, 116 S. E. 101; *Dragon Motor Car Co.* v. *Starrow*, 205 N. W. 694; *Rishmiller* v. *R. R. Co.*, 134 Minn. 262; *Lafayette Ins. Co.* v. *French*, 18 How. 404; *Pennoyer* v. *Neff*, 95 U. S. 714; *St. Clair* v. *Cox*, 106 U. S. 350; *Conn. Mut. Life, etc., Co.* v. *Spratley*, 172 U. S. 602; *Goldey* v. *The Morning News*, 156 U. S. 518; *Conley* v. *Alkali Works*, 190 U. S. 406; *Old Wayne Mut. Life Ins. Assn.* v. *McDonough*, 204 U. S. 8; *Peterson* v. *Chicago R. I. & P. R. R.*, 205 U. S. 389; *Hunter* v. *Mutual Reserve Life Ins. Co.*, 218 U. S. 573; *Comm. Mut. Accident Co.* v. *Davis*, 213 U. S. 245; *Riverside etc., Cotton Mills* v. *Menefee*, 237 U. S. 189; *Simon* v. *Southern R. Co.*, 236 U. S. 115; *Farmers & Merchants Bank* v. *Fed. Res.*, 286 Fed. 565; *Rosenberg Bros.* v. *Brown Co.*, 260 U. S. 517; *Lumiere* v. *Wilder*, 261 U. S. 174; *Lee* v. *Newman*, 55 Miss. 365; *Washington* v. *Soria*, 73 Miss. 665.

(b) DEFENDANT ESTOPPED FROM CLAIMING NO BUSINESS DONE BY EXECUTION OF CONTRACT AGREEING TO BE SUED.

Pennoyer v. *Neff*, 95 U. S. 714.

POINT II.

Defendant's acts a doing of business.

(a) QUALIFICATION IS EQUIVALENT, AS TO AN INSURANCE COMPANY, TO DOMESTICATION.

State ex rel. v. *Grimm*, 239 Mo. 135.

Cainey v. *United Surety Co.*, 217 N. Y. 273.

(b) REINSURANCE IS DOING BUSINESS.

Sections 5070-77, Hem. Code; Section 5028, Hem. Code; Section 5119, Hem. Code; Section 5144, Hem. Code; Section

5141, Hem. Code; *State ex rel. European Accident, etc., Co.* v. *Tomlinson*, 129 N. E. (Ohio) 684; Section 5014, Hem. Code; Section 5023, Hem. Code; *Fikes* v. *State*, 87 Miss. 251; *State* v. *Alley*, 86 Miss. 720; Section 5027, Hem. Code; *Allemania Fire Ins. Co.* v. *Firemens Ins. Co.*, 209 U. S. 632, 52 L. Ed. 845.

POINT III.

When defendant's qualification in Mississippi was for a complete transaction of business, its voluntary election to do only a certain portion does not confer immunity from suit.

Farmers & Merchants Bank v. *Fed. Res.*, 262 U. S. 659; *Security Mut. Life Ins. Co.* v. *Prewitt*, 202 U. S. 246; *State* v. *Alley*, ~~81 So. 107~~ (Miss.); *Fikes* v. *State*, 87 Miss. 251.

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POINT IV.

Defendant entered voluntary appearance.

(a) AS PLAINTIFF SUED DEFENDANT IN MISSISSIPPI, WHERE NEITHER RESIDED, DEFENDANT BY REMOVAL WAIVED OBJECTION TO PERSONAL JURISDICTION.

Ex parte Wisner, 203 U. S. 449; *Ex parte Moore*, 209 U. S. 470; *U. S.* v. *Hesslob*, 237 U. S. 12; *Rose's Fed. Jurisdiction & Prac.* (3d Ed.) 383; *Vaughn* v. *McArthur Bros. Co.*, 227 Fed. 307; *Nuckels* v. *Pullman Co.*, 268 Fed. 614; *Klink* v. *Chicago R. I. P. Ry. Co.*, 219 Fed. 457; *Matarazzo* v. *Hustis*, 257 Fed. 894; *Cincinnati Ry. Co.* v. *Orr*, 215 Fed. 262; *Coalmont, etc., Coal Co.* v. *Matthews, etc.*, 271 Fed. 115; *Pollard* v. *Dwight*, 4 Cranch 421.

(b) PLEAS OF LIS PENDENS IN DISTRICT COURT BEING MADE, SECTION 523, HEM. CODE, 1917, IS INOPERATIVE TO OUST FEDERAL JURISDICTION WHICH IS NOT AFFECTED BY THE CONFORMITY STATUTE.

Mankin v. *Bartley*, 255 Fed. 466; *Munter* v. *Weil Faucette Co.*, 261 U. S. 276; *Mechanical Appliance Co.* v. *Castleman*, 215 U. S. 438; *Western Loan & Savings Co.* v. *Butte, etc.*, 210 U. S. 368; *Big Vein Coal Co.* v. *Read*, 229 U. S. 38; *St. Louis & S. F. R. Co.* v. *McBride*, 141 U. S. 127; *Jones* v. *Andrews*, 10 Wall. 327; *Chatters* v. *Louisville & N. R. Co.*, 17 Fed. (2d ed.) 306; *Cain* v. *Comm. Pub. Co.*, 232 U. S. 124; *Frackman* v. *Lloyds*, 7 Fed. (2d ed) 620; *De Lima* v. *Bidwell*, 182 U. S. 174.

ARGUMENT.

POINT I.

Defendant is subject to suit in Mississippi on a policy of insurance issued outside of Mississippi wherein a loss occurred May 23, 1919, when thereafter defendant qualified in Mississippi on March 27, 1923.

(a) DEFENDANT'S CONTRACT CONFERS JURISDICTION UPON THE COURT, IRRESPECTIVE OF THE DOING OF BUSINESS.

District Court directed a verdict because defendant "was not doing business in Mississippi." The Court of Appeals specifically affirmed.

In 1923 defendant was

> "desirous of *re-entering* the State of Mississippi *for the purpose of transacting a fire re-insurance business* under treaties with direct writing companies"

and on March 27, 1923, executed general powers of attorney quoted *supra*, pp. 3, 4, covering

> "*all processes* of law against said corporation *in any action*."

This corporation paid the license tax, exacted under Section 5074.

On March 6, 1917, two cases were decided, *Philadelphia & Reading R. Co.* v. *McKibbin*, 243 U. S. 264, by Justice Brandeis, and *Pennsylvania Fire Ins. Co.* v. *Gold Issue Mining & Milling Co.*, 243 U. S. 93, 61 L. ed. 610, herein called Gold Issue case. There the insurance company had executed a power of attorney under a statute the equivalent to that of Mississippi. The Mining Company, an Arizona corporation, brought an action in Missouri on a policy issued in Colorado on property therein. Missouri, just as

Mississippi, construed her statute (267 Missouri 524, 184 S. W. 999), and the Federal Supreme Court said:

> "The construction of the Missouri statute thus adopted hardly leaves a constitutional question open. The defendant has executed a power of attorney *that made service on the superintendent the equivalent of personal service. If by a corporate vote it had accepted service in this specific case, there would be no doubt of the jurisdiction of the state court over a transitory action of contract.* If it had appointed an agent authorized *in terms to receive service in such cases, there would be equally little doubt.* * * * It did appoint an agent *in language that rationally might be held to go to that length.* The language *has been held to go to that length, and the construction did not deprive the defendant of* due process of law even *if it took the defendant by surprise, which we have no warrant to assert.* * * * Other state laws have been construed in a similar way; *e. g., Bagdon* v. *Philadelphia & R. Coal & I. Co.*, 217 N. Y. 432, L. R. A. 1916F 407, 111 N. E. 1075; *Johnston* v. *Trade Ins. Co.*, 132 Mass. 432.
>
> But *when a power actually is conferred by a document, the party executing it takes the risk of the interpretation that may be put upon it by the courts. The execution was the defendant's voluntary act. The Eliza Lines*, 199 U. S. 119, 130, 131, 50 L. Ed. 115, 120, 26 Sup. Ct. Rep. 8, 4 Ann. Cas. 406."

On the same day, Mr. Justice Brandeis, in the McKibben case, declares:

> "A foreign corporation *is amenable to process* to enforce a personal liability, *in the absence of consent* only as to doing business within the state, in such a manner and to such an extent as to warrant the inference that it is present there."

So, under the Constitution, we have two separate cases, service (a) by consent [the case here], (b) by the doing of business.

The *McKibben case* deals specifically with all of the decisions which could be relied on *contra*. These two decisions covered the one, *consent*, the other, the implication

from business done, without qualification. Since that date the decisions as to doing of business, as embodied in the *McKibbin case*, have never questioned the "consent" decision, and were approved in *Hess* v. *Pawloski*, 274 U. S. 352; 71 L. Ed. 866; *Wucher* v. *Pizzutti*, 48 Sup. Ct. Reporter 259, dissenting opinion in *Power Co.* v. *Saunders*, 274 U. S. 498, 71 L. Ed. 1170.

In *Robt. Mitchell Furniture Co.* v. *Construction Co.*, 257 U. S. 213, 66 L. Ed. 201, Mr. Justice Holmes, who delivered the opinion in the *Gold Issue case*, said:

> "The purpose in requiring the appointment of such an agent is primarily to secure local jurisdiction in respect of business transacted within the state. Of course when a foreign corporation *appoints one*, as required by statute, *it takes the risk of the construction that will be put upon the statute* and the *scope of the agency by the state court*. *Pennsylvania F. Ins. Co.* v. *Gold Issue Min. & Mill. Co.*, 243 U. S. 93, 61 L. Ed. 610, 37 Sup. Ct. Rep. 344. • • • *Unless the state law, either expressly or by local construction, gives* to the appointment *a larger scope*, we should not *construe it to extend to suits in respect of business transacted by the foreign corporation elsewhere*, at least, if begun, *as this was, when the long previous appointment of the agent is the only ground for imputing to the defendant an even technical presence*. *Shipment* v. *Thomas B. Jeffrey Co.*, *supra*. The indications of the Ohio Statutes, so far as they go, look to 'Liability incurred within this state.' Gen. Code, Sec. 181. As *we know of no decision to the contrary* by the Supreme Court of Ohio, we are of opinion that the service upon Nash was bad." See also, *Railroad Co.* v. *Oar Co.*, 257 U. S. 533; 66 L. Ed. 354."

To qualify as a foreign corporation in Mississippi, defendant made a special deposit "in exclusive trust" for this plaintiff, conferring the rights set out in *Blake* v. *McClung*, 172 U. S. 239, 43 L. Ed. 432.

People v. *Assn.*, 55 N. E. (N. Y., 1899) 1054.

Defendant specifically contracted that the process served upon Henry should be effectual:

(a) "T. M. Henry, insurance commissioner," was "its true and lawful attorney * * * upon whom *all process of law against* said corporation *in any action* may be served, subject to and in accordance with the provisions of the *statutes and laws of the State of Mississippi.* * * * And shall be deemed *valid personal service* upon said company, and shall be of the same *force and validity as if served upon said company.*"

And further, did agree as to said Wilkerson likewise.

The defendant applied, voluntarily, to be admitted into Mississippi, and declared:

"We shall immediately execute same and return to you, and hope that pending filing of this statement you will issue our license *to do business in your state.*" (R., 145.)

In virtue of this license it must be presumed that the company was doing business, if that is esential. *Compania Gen. de Tobacos* v. *Collector of Int. Revenue*, 275 U. S. 87.

Under powers of attorney, the defendant having made this deposit in exclusive trust was liable on any transitory cause of action in any court in the State of Mississippi of general jurisdiction both (1) by decision and, (2) express statute.

1. *Decisions.*

(a) In *N. O. J. & G. N. R. R. Co.* v. *Wallace*, 50 Miss. 244, it is said:

"*But they are liable to be sued like natural persons in transitory actions, arising ex contractu* or *ex delicto*, in any state, where *legal services of process can be had.* And upon a thorough examination of the law upon this subject, we have not been able to find much ground to doubt whether a private corporation of another state could be held to *answer to an action in our courts.* We can see no very good reason why artificial

persons should not be liable to suit in the courts of another state, as well as natural persons."

(b) See also, *Pool* v. *L. & N. Railroad*, 72 Miss. 287; *N. O. G. N. R. R.* v. *Fortenberry*, 107 Miss. 83.

(c) In *Pullman Co* v. *Laurence*, 74 Miss. 880, it was said:

"Independently of all adjudications on this subject, however, jurisdiction of the present case was properly taken by the court below under a positive statute of this state. Code of 1892, Section 849 (which is found in our former codes of 1880, 1871 and 1857, though not called to the attention of this court by counsel in any of our former cases in which this question was considered), is in these words, viz.:

'849. *Of foreign corporations.*—Corporations which exist by the laws of any other state of the Union, by the acts of congress, or the laws of any foreign state, may sue in this state by their corporate names, and they SHALL ALSO BE LIABLE TO BE SUED, *or proceeded against, by attachment*, or OTHERWISE, as INDIVIDUAL NON-RESIDENT DEBTORS MAY BE SUED *or proceeded against,' etc.*

By this statute, our courts are *thrown wide open to foreign corporations*, and they are made liable *to suit just as individual non-residents are*. They may be proceeded against by attachment, in proper cases, just as individual non-residents are liable to be proceeded against, or, *if legal process can be served on them in this state, they may be sued in any other appropriate form of action, just as individual non-residents who may come into this state and be legally served with process and may be sued in any appropriate action. The statute is so brief, plain and simple that it bears its meaning on its face and carries its own interpretation in its own language. We are of the opinion that the demurrer to the plea to the jurisdiction was properly sustained.*"

(d) Again, in *Vicksburg, Shreveport & Pacific R. R. Co.* v. *Parcheimer*, 74 Sou. 419, where it was said:

"Chapter 123, Laws 1908, is as follows:

'Any corporation claiming existence under the laws of any other state or of any other country foreign to the United States, found doing business in this state, shall be subject to suit here to the same extent that corporations of this state are, *whether the cause of action accrued in this state or not*,' etc.

If we should look alone to our statutes and the decisions of this court, this case would be affirmed without a written opinion. See *New Orleans, etc., R. Co.* v. *Wallace*, 50 Miss. 244; *Pullman Palace Car Co.* v. *Lawrence*, 74 Miss. 782, 22 South 53. * * *

The constant tendency of judicial decisions in modern times has been in the direction of putting corporations upon the same footing as natural persons in regard to the jurisdiction of suits by or against them."

(c) In *Fidelity, etc., Co.* v. *Cross*, 89 So. Miss. 780, the court said:

"In the present case the company filed the appointment of the insurance commissioner as its attorney in fact, as required by this section, and for the purpose of suit the commissioner is, under the terms of the statute, the *alter ego* of the company."

Southern Ins. Co. v. *Gormillian*, 110 So. (Miss.) 770.

Delta Ins. Co. & Realty Co. v. *Fourth National Bank*, 111 So. (Miss.) 435.

See also *Camden Fire Ins. Co.* v. *Delaney*, 116 So. (Miss.) 743.

2. STATUTES.

(a) By Section 4088, Hem. Code, it is expressly provided as set out in Pullman case, *supra*.

The admeasurements hereunder of liability to suit are that of "individual non-resident debtors." When such an individual non-resident debtor is served with process, he may be sued in any form of action in Mississippi.

(b) Not content with one statute, there is another—Section 4093, Hem. Code, set out in Forcheimer case, *supra*.

Thus, express declaration is contained: "Whether the cause of action *accrued in this state or not.*"

Of these statutes our court said, 74 So. (Miss.) 420:

> "It does not appear that either the Pennsylvania or the Louisiana statute involved in these two cases, respectively, expressly authorize a suit against a foreign corporation on a cause of action which did not accrue within the state enacting the statute in question. *Our statute in this regard is much more comprehensive, and expressly authorizes suit here, 'whether the cause of action accrued in this state or not.'*"

The contract signed by respondent covered liabilities "whether incurred before or since the making and execution of this instrument." On May 19, 1919, defendant became liable to plaintiff on a personal obligation for $50,000 United States gold, and being so liable, on the 27th day of March, 1923, executed the appointment quoted.

Respondent could not do business in Mississippi before the date of this instrument, yet respondent contracted for suit to be brought, covering not only subsequent obligations but obligations incurred before qualification, necessarily implying thereby a subordination to service in Mississippi for this cause of action. The contract entered into with respect to Mississippi's jurisdiction subordinated respondent as to precedent liabilities, necessarily extraterritorial, and were by this contract specifically assumed. Opposite counsel recognized this when, on page 63 in Court of Appeals, of his brief he said:

> "It may be that the broad language of the Mississippi statutes, and particularly Section 4586 of Hemingway's Miss. Code of 1927 (Sec. 4093 of Hemingway's Miss. Code of 1917), and THE JUDICIAL CONSTRUCTIONS THEREOF, are sufficient to enable the maintaining of an action in Mississippi, on a cause of action arising without the state, by service on an agent for service, when the defendant is 'found doing business' within the state; though this may be doubted."

This judicial construction here admitted is conclusive So, when there was a specific consent given, admeasuing liability to suit both by precedent and subsequent obligations, of necessity, those that were extraterritorial were included, and the appointment of a local agent in Mississippi was sufficient to authorize an action there.

The appointment of Wilkinson as agent—a *bona fide* resident of Missisippi—was not a farce, yet, if respondent's contention is allowed, there was naught wherefor Wilkinson could be used; no process could be on him served, obviously a *non sequitur* from the mandatory requirement of his appointment, conditioning thereby that sought by repondent to be done.

This rule is rather general elsewhere.

Pennsylvania Fire Insurance Co. case, 267 Mo. 524, 184 S. W. 999; *State ex rel. Grimm*, 239 Mo. 135, 143 S. W. 432; *Johnson v. Trade Ins. Co.*, 132 Mass. 432; *Wilson v. Fire Alarm Co.*, 149 Mass. 24; *Reynolds v. M. K. & T. Ry. Co.*, 117 N. E. (Mass) 913, affirmed *per curiam*, 255 U. S. 565. Note the limitation, however, in *Davis v. Farmers Equity Co.*, 262 U. S. 312; *Bagdon v. Philadelphia & Reading Coal & Iron Co.*, 217 N. Y. 432; *State ex rel. v. Gehrz*, 194 N. W. 418; *Rishmiller v. R. R. Co.*, 134 Minn. 262, 159 N. W. 272; *Mooney v. Buford*, 72 Fed. 32; *Smolik v. Philadelphia & Reading Coal & Iron Co.*, 222 Fed. 148; *Farmers & Merchants Bank v. Fed. Res.*, 286 Fed. 2[illegible]

In the court below it was contended that many authorities were *contra*; the differentiation adverted to in the *Robert Mitchell Furniture Company case*, *supra*, runs through the gamut.

Consent to accept service is the predicate on which the service in this cause was made.

What could be more reasonable than to require defendant to keep its contract?

Note the condition of admission to do insurance business in Mississippi whereunder the deposit is for:

> "exclusive trust for the benefit and security of all the company's policyholders and creditors in the United States."

Thereunder when this defendant qualified in Mississippi it contracted for the benefit of "all of the company's policyholders and creditors in the United States, * * *" That this deposit should be an "exclusive trust" for them—that is, "all the company's policyholders and creditors in the United States."

By *Lee* v. *Newman*, 55 Miss., 365, and *Washington* v. *Soria*, 73 Miss. 665, a direct cause of action was created in favor of plaintiff assertable in the courts of Mississippi in its own name therefor.

The ruling of the court below confused the implications drawn by law from doing business without qualification, and erroneously limited a *precise* contract by an *implication* in no wise applicable.

(b) Defendant estopped from claiming no business done by execution of contract agreeing to be sued.

As said in *Pennoyer* v. *Neff*, 95 U. S. 714, quoting to approve Court of Exchequer in *Vallet* v. *Dumergue*, 4 Exchequer, 290:

> "It is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notification has been followed, even though he may not have had actual notice of them."

When defendant came to Mississippi to participate in the insurance business in Mississippi, it wrote this letter (March 16, 1923):

> "This company *being desirous of re-entering the State of Mississippi*, for the purpose of transacting a

> fire reinsurance business under treaty with direct writing companies *authorized to transact business in your state*, we shall be obliged to have certain information." (R., 139, *et seq.*)

And in the pursuance thereof, it executed its powers of attorney.

Again: The tax statement was returned pointing out that the direct writing companies paid the premium tax, and then the corporation shows that it did business to the extent of millions of dollars in virtue of these representations so thus made. (R., 165, *et seq.*)

Now having obtained its license to do business in virtue of these representations that it was so thus doing business, can it now, in full possession of the rights of such business, the exact nature of which it clearly understood, contend that it did not do business when all these precise declarations to the contrary were explicitly made, and in virtue of them alone, the right to reinsurance business was secured?

As was said in *Lowrey* v. *Hawaii*, 206 U. S. 222, 51 L. ed. 1033:

> "In *Brooklyn L. Inc. Co.* v. *Dutcher*, 95 U. S. 269, 24 L. ed. 410, it was said: 'There is no surer way to find out what parties meant than to see what they have done.'"

The defendant could not participate in reinsurance, and having represented that it was doing business, is now estopped to question that such business was so done. The law sitused everything in Mississippi expressly. It required resident agents and resident action and the mere fact that these actual agreements were perchance made in New York do not override the express statutes of Mississippi localizing here, and defendant, having agreed to obey the law, is estopped to say its acts do not conform thereto.

POINT II.

Defendant's acts a doing of business.

(a) Qualification Is Equivalent, as to an Insurance Company, to Domestication.

In *State Ex Rel.* v. *Grimm*, 239 Missouri, 135; 143 S. W. 432, that court said:

> "Within the contemplation of the statute relating to service of summons upon foreign insurance companies, *such companies are regarded as residing in each county in this state.* (*Meyer* v. *Ins. Co.*, 184 Mo. 486.)"

Cairney v. *United Surety Company*, 217 N. Y. (1916), 273, holds:

> "*We think that a foreign corporation thus licensed under our own laws may not with reason be held to be absent from our State.* It owes to the law of its creation its franchise to be a corporation, *but* it *owes to the law of this State the privilege of doing business within our borders.* In exercising that privilege it may be dealt with as if it were in truth a domestic corporation. This view of its position has support in recent decisions."

(b) Reinsurance Is Doing Business.

The qualification was general. Its election to segregate its business to a particular branch was voluntary.

Under these statutes *reinsurance* is doing business in Mississippi, Sections 5014, 5023, 5070, 5071, 5028, 5119, 5144, 5141, as the very instruments by defendant executed, declare. 5802 5803-5805-5806-5818 5915-5940

State Ex Rel European Accident Insurance Co. v. *Tomlinson*, 129 N. E., 684 (Ohio, 1920), is conclusive.

This decision goes to the full extent of holding that reinsurance made in New York was subject in all things to the power of the Insurance Commissioner of the State of

Ohio; and the State of Ohio might condition the right to do this reinsurance business as it saw fit and the manner wherein this reinsurance was being done, was a matter whereover the defendant was liable to the jurisdiction of the State and was doing business in Ohio.

The insurance business, as a business, is one whereover plenary power is vested in the State.

POINT III.

When defendant's qualification in Mississippi was for a complete transaction of business, its voluntary election to do only a certain portion does not confer immunity from suit.

Defendant, upon qualification, became conversant with the statutes and decisions of Mississippi applicable, and as said in *Farmers & Merchants Bank* v. *Federal Reserve Bank*, 262 U. S. 659, 67 L. ed. 1164:

> "And as the statute is prospective in its operation (*Denny* v. *Bennett*, 128 U. S. 489, 32 L. ed. 491, 9 Sup. Ct. Rep., 134; *Abilene Nat. Bank* v. *Dolley*, 228 U. S. 1, 5, 57 L. ed. 707, 709, 33 Sup. Ct. Rep. 469), there is no constitutional obstacle to a state's providing that, in the absence of dissent, consent shall be presumed. Laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as fully as if they had been expressly referred to or incorporated in its terms. This principle embraces alike those laws which affect its construction and those which affect its enforcement or discharge. See *Ogden* v. *Saunders*, 1 Wheat 213, 231, 6 L. ed. 606, 611; *Von Hoffman* v. *Quincy*, 4 Wall. 535, 550, 18 L. ed. 403, 408."

This provision of law made for the insurance companies coming into Mississippi constituted an element of contract. It is well to remember the declarations of *Security Mutual Life Insurance Company* v. *Pruett*, 202 U. S. 246, 50 L. Ed. 1013, where the cases are collected dealing with the right

of a state to exclude a foreign corporation, and while it is true that in a certain aspect the holding has been overruled, yet the holding of the majority opinion remains unimpaired and the state may condition a foreign corporation doing business in such manner as it may think wise; provided, only, it does not exact the foregoing of the right guaranteed by the Federal Constitution. *Insurance Company* v. *Hyde*, U. S. Adv. Op. 163; Feb. 1, 1928, *supra; Tyson* v. *Banton*, 274 U. S. 418, 71 L. Ed. 18, *supra; Insurance Company* v. *Lewis*, 233 U. S. 389, 58 L. Ed. 1011, *supra*.

Mississippi did not segregate the business of reinsurance into a separate, distinct category which might be exercised without the qualification to do a direct writing business. Therefore, qualification exacted by the statutes, *supra*, constituted an absolute license to the defendant to preempt and occupy the entire insurance field, direct writing, reinsurance writing, and what-not. The defendant knew that such a consent was requisite and, so knowing, consented; but now having consented, contends that it may not be subordinated and sued, for the reason that though it be licensed to do the full insurance business, contrary to permission of the statute, it will segregate and select that which is profitable and leave undone that which is unprofitable, and by its selection, its segregation, nullify the prime condition of its qualification, which was subordination to Mississippi's sovereignty as an entirety.

No power is vouchsafed defendant to divide the state's sovereignty, and by such severance subject the sovereignty to the caprice of an alien subject.

State v. *Alley*, 51 So. 467, 96 Miss. 720.

Fikes v. *State*, 87 Miss. 251, 39 So. 783, supra.

Thus, construing the statute this course of conduct upon the part of defendant is intolerable; its subordination, under its qualification, must be admeasured by the provisions of

the law, and not by the caprice of defendant in its selection of that which it feign would have from other business it did not desire. This power under Mississippi statutes, is not vouchsafed. Qualification means subordination, with responsibility, expressly given in virtue of the deposit made unto all policyholders and *all creditors* in the United States, whereof plaintiff was one, in a transitory cause of action.

POINT IV.

Defendant Entered Voluntary Appearance by:

a. Plaintiff sued defendant in Mississippi, where neither resided; by removal defendant waived objection to personal jurisdiction;

b. Filing plea and motion, Section 523 Mississippi, Hemingway's Code, 1917, being inoperative because statute not operative in jurisdictional matters.

(a) Plaintiff Sued Defendant in Mississippi, Where Neither Resided, and by Removal Defendant Waived Objection To Personal Jurisdiction.

Plaintiff, a non-resident of Mississippi, voluntarily sued defendant, likewise a non-resident of Mississippi, in the circuit court of Harrison County, whereupon defendant removed to the District Court of Mississippi when neither party resided in Mississippi.

Ex parte Wisner, 203 U. S. 449, 51 L. ed., 264, sets forth the applicable statutes as follows:

> "The 1st section of the Act of March 3, 1887, (24 Stat. at L. 522, Chap. 373), as corrected by the Act of August 13, 1888 (25 Stat. at L. 433, Chap. 866) amended Sections 1 and 2 and 3 of the Act of Congress of March 3, 1875 (18 Stat. at L. 470, Chap. 137, U. S. Comp. Stat. 1901, p. 508), as follows:

"That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, * * * in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid; * * * *But no person shall be arrested in one district for trial in another in any civil action before a circuit or District Court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant;* but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought *only in the district of the residence of either the plaintiff or the defendant.* * * *

Sec. 2. That any suit of a civil nature * * * of which the Circuit Courts of the United States are given original jurisdiction by the preceding section, * * * may be removed by the defendant or defendants therein to the Circuit Court of the United States *for the proper district.* Any other suit of a civil nature, at law or in equity, of which the Circuit Courts of the United States are given jurisdiction by the preceding section and which are now pending, or which may hereafter be brought, in any state court, may be removed into the Circuit Court of the United States for the proper district by the defendant or *defendants therein being non-residents of the state.*"

At page 459, the court said:

"In short, the Acts of 1887, 1888 restored the rule of 1789, as we stated in *Cochran* v. *Montgomery* County, *supra.*

In the present case *neither of the parties was a citizen of the state of Missouri,* in which state the suit was brought, and, therefore, *it could not have been brought in the Circuit Court in the first instance.*

"Wisner did not, of choice select the state court as a forum, since *he could not have sued in the Circuit* Court under the act, *because neither he nor Beardsley was a citizen of Missouri.* And the question of jurisdiction *relates to the time of commencing the suit.*

"But it is contended that Beardsley was entitled to remove the case to the Circuit Court, **and as by his petition for removal, he waived the objection so far as he was personally concerned that he was not sued in his district, hence that the Circuit Court obtained jurisdiction over the suit. * * * 'A petition and bond for removal are in the nature of process. They constitute the process by which the case is transferred from the state to the Federal Courts.** When then Beardsley filed his petition for removal *he sought affirmative relief in another district than his own.* But plaintiff, in resisting the application, and moving to remand, denied the jurisdiction of the Circuit Court. In *St. Louis & S. F. R. R. Co.* v. *McBride*, 141 U. S. 127, 35 L. ed. 659, 11 Sup. Rep. 982, where the plaintiffs were citizens and residents of the western district of Arkansas, and commenced their action in the Circuit Court of the United States for the district, and the defendant was a corporation and citizen of the State of Missouri, it was held that, as the defendant appeared and pleaded to the merits he thereby waived his rights to challenge thereafter the jurisdiction of the court over him, on the ground that the suit had been brought in the wrong district. And there are many other cases to the same effect.

"Our conclusion is that the case should have been remanded; and as the Circuit Court had no jurisdiction to proceed, that mandamus was the proper remedy."

It will be specifically noted that in that case the chief justice, among other things, held "*When, then, Beardsley filed his petition for removal, he sought affirmative relief in another district than his own.*"

That declaration of the *Wisner* case has not been overruled.

Shortly after came *Ex Parte Moore*, 209 U. S. 470, 52 L. Ed. 907.

There Mr. Justice Brewer, who had concurred in the conclusion in the *Wisner* case, delivered the opinion. There, an infant, by his next friend, brought an action in

the state court of Missouri against the L. & N. R. R. Co., a Kentucky corporation, for personal injuries. The railroad company filed a petition to remove, based upon diverse citizenship.

The plaintiff filed in the District Court, after removal an amended petition; defendant was given time to plead.

At the September Term, 1907, a motion was made to remand and overruled. Thereupon an application for mandamus was presented to the Supreme Court, Mr. Justice Brewer said:

> "This brings up two questions: First, *whether both parties did consent to accept the jurisdiction of the United States Court*; and, second, if they did *what effect such consent has upon the jurisdiction of the United States Court.*
>
> "*That he defendant consented to accept the jurisdiction of the United States Court is obvious. No clearer expression of its acceptance of the jurisdiction of the latter court could be had.*"

In the case at bar, neither the plaintiff nor the defendant were resident in Mississippi, and the defendant, a *non-resident of Mississippi*, voluntarily removed, and voluntarily gave bond to *appear*, even; in addition, filed the motions and pleas. The defendant could not have been sued in the District Court by the plaintiff, had defendant taken suitable objection.

This disability is personal—modal—*United States v. Heasleb*, 237 U. S. 12, 59 L. Ed. 818, and may be waived by the defendant.

Then, the *Moore* case, *supra*, says (page 911):

> "The contention is that, *as this action could not have been originally brought in the Circuit Court of the Eastern District of Missouri*, by reason of the last provisions quoted from Section 1, *it cannot*, under Section 2, *be removed to that court*, as the authorized removal is only of those cases of which, by the prior section, original jurisdiction is given to the United States

Circuit Courts. *But this ignores the distinction between the general description of the jurisdiction of the United States Courts and the clause naming the particular district in which an action must be brought.*

It may be well to examine the authorities touching this matter. In *Gracie* v. *Palmer*, 8 Wheat. 699, 5 L. L. Ed. 719, the court, by Mr. Chief Justice Marshall, held that:

'The exemption from arrest in a district in which the defendant was not an inhabitant, or in which he was not found at the time of serving the process, *was the privilege of the defendant*, which he might **waive by a voluntary appearance**.'

* * * * *

In *Interior Constr. & Improv. Co.* v. *Gibney*, 160 U. S. 217, 219, 40 L. Ed. 401, 402, 16 Sup. Ct. Rep. 272, 273, Mr. Justice Gray thus stated the law:

"That jurisdiction may be invoked in an action originally brought in a Circuit Court or one subsequently removed from a State Court; and, if any objection arises to the particular court which does not run to the Circuit Courts as a class, *that objection may be waived by the party entitled to make it*. **As we have seen in this case, the defendant applied for a removal of the case to the Federal Court**. *Thereby he is foreclosed from objection to its jurisdiction.*"

Note the defendant applied for a removal of the cause to the Federal Court. Thereby he was foreclosed from objecting to its jurisdiction of the person.

This is a direct decision as to the effect of removal. So far as we can ascertain, this decision remains the law, though touched upon, it is true, in *General Investment Co.* v. *R. R. Co.*, 260 U. S. 261, 67 L. Ed. 244, it was not decided, *contra*, as we understand that case.

In Rose's Federal Jurisdiction and Procedure (3d Ed.) 363, it is said:

"It speedily became apparent that much said in that case (*ex parte Wisner*) went beyond what the majority of the court upon fuller reflection were willing to approve. Subsequent decisions limited its application and shook its authority, and in January, 1923, in *Lee*

v. *Chesapeake & Ohio Railway Company* it was expressly overruled. It was then declared that Section 28 is not restricted by the venue provisions of Section 51. *The latter merely extends to defendants a privilege which they may waive and their application to remove is a waiver.*"

See *Id.* 337.

To like effect: *Vaughn* v. *McArthur Bros Co.*, (C. C. A., 8th Cir.) 227 Fed. 367.

Coalmont, etc., Coal Co. v. *Matthews & Addy Steamship Corp.*, 271 Fed. 115.

While it is true that the Supreme Court reversed the decision of the Circuit Court of Appeals in *Wabash Western Railway Co.* v. *Brow*, 65 Fed. 945, it seems to us, with deference, to have been correctly decided. Two members of that court subsequently sat on the Supreme bench and the present chief justice delivered the opinion below in the *Brow* case. There he cited *Pollard* v. *Dwight*, 4 Cranch. 421, where Dwight brought a foreign attachment against Pollard in a state court. The defendants removed the cause to the United States Court and there pleaded to the jurisdiction.

"In *Sayles* v. *Insurance Co.*, 2 Curt. 212 Fed. Cas. No. 12, 421, a foreign corporation sued in a state court of Rhode Island filed a petition in that court to remove the suit to the Circuit Court of the United States for that district. The defendant then moved to dismiss the action for want of jurisdiction, on the ground that the only service made in the state court had been an attachment of the goods and effects of the defendant, *because it was neither an inhabitant of the district where the suit was brought, nor was it found therein;* but Mr. Justice Curtis held that under the twelfth section of the Judiciary Act it was not necessary that the defendant should be an inhabitant of the district, or should be personally found therein; *that under that act any process in accordance with the laws of the state, by which the defendant was made a party was sufficient to constitute it a pending suit for removal*

within the jurisdiction of the Federal Court. As a second ground, however, for his conclusion he said:

'Besides, it has been held in *Toland* v. *Sprague*, 12 Pet. 300, that the locality of the action within the district where the defendant is an inhabitant or is found, is a personal privilege of the defendant, which he may waive by appearing and pleading to the action. And I am of opinion that when he appears in a state court, files a petition for leave to remove the action, gives a bond to enter it in the Circuit Court, and actually enters it there, *he has waived any personal privilege he might have had to be sued in another district.* If pleading to the action amounts to a waiver of such privilege, upon the ground that he ought not afterwards to be heard to object to the means by which he was brought into court, I do not perceive why these proceedings should not have the same effect. *The defendant comes in, becomes the actor, treats the suit as one properly instituted, removes it to another court and enters it there,* and then says he is not obliged to appear at all, and the state court in effect had no suit before it. This, I am of the opinion, he cannot do. I consider that this court will not look back to inquire into or try the question whether the state had jurisdiction. The act of congress allows defendant to remove actual and legally pending suits from the state courts. If this were not such a suit, the defendant should not have brought it here. By bringing it here, he voluntarily treats it as properly commenced, and actually pending in the state court; and he cannot, after it has been entered here, treat it otherwise. It is urged that this will prevent citizens of other states from trying in this court the question whether the state court had jurisdiction. Not so. If the state court had no jurisdiction, and the defendant does not appear, its proceedings are all void, and may be shown to be so in an action brought in this court against any one who meddles with the person or property of the defendant under the color of such proceedings. The only objections which the defendant will be precluded from trying here are technical objections which do not affect the merits; and I see no good reason why he should not be prevented from trying them here.'

These remarks have been referred to as *obiter dicta*, and unnecessary to the decision of the case. This

is hardly a proper statement of their effect. Mr. Justice Curtis puts his decision on two grounds, either of which sustains his conclusion, and the statement of neither, therefore, is *obiter dictum*. * * *

'But we cannot recognize the validity of the inference that the defendant, before pleading in the Circuit Court, *may move to dismiss the suit for want of jurisdiction. This construction would enable the non-resident defendant in a state court to remove the suit against him into a circuit court, and then, by a simple motion to dismiss, defeat the jurisdiction of both courts. Such a construction unless imperatively required by the plain language of the act* does not require it. Its plain meaning is that the suit shall proceed, *not that it shall proceed unless the defendant moves to dismiss. The defendant is not in court against consent, but by his own act;* and the suit is *to proceed as if brought by original process*, and the defendant had waived all exception to jurisdiction, and pleaded to the merits.'"

Think of the result, if a corporation, in virtue of the venue statute, similar to the Chesapeake & Ohio Railroad, could remove all controversies to the District Court, and then promptly dismiss them, in virtue of the jurisdiction voluntarily invoked, on the ground that said suit could not be prosecuted in a district other than that wherein plaintiff or defendant was a resident.

In the *Lee case, supra*, the plaintiff moved that the suit be remanded on the ground that there was no jurisdiction, in that neither party was a resident of the district. The motion was overruled. The plaintiff elected to stand on the motion and judgment was given for the defendant, whereupon the case was brought to the Supreme Court direct on the former practice as to jurisdiction. There was again a review of the constitutional provisions vesting jurisdiction, and it was pointed out that the District Court had jurisdiction:

"of all suits of a civil nature at common law * * *
where the matter in controversy exceeds * * *

three thousand dollars and * * * is between citizens of different states."

Mr. Justice Van Devanter pointed out that this was a grant of jurisdiction; then he dealt with Section 51, which provided:

> "No civil suit shall be brought in any district court *against any person* by any original process * * * in any other district than that whereof he is an inhabitant but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant. *There was no jurisdiction over the person of the defendant in the district*, but knowing this full well, defendant elected to invoke the jurisdiction of this District Court, otherwise not obtainable except by its consent. Removal to this District Court gave this consent, and was a complete waiver of any further right to deny jurisdiction over the *person* of defendant—by removal, all such was ended."

(b) Filing pleas and motions, Section 523, Hem. Code, 1917, being inoperative because statute not operative in jurisdictional matters:

1. Defendant entered a general appearance by its pleas and motions. At common law, there were three kinds of pleas: (1) plea to the jurisdiction; (2) plea in abatement, and (3) plea in bar. A defendant wishing to file any of these pleas must file in the order named and by the filing of a plea out of order, the defendant was conclusively presumed to have waived all preceding pleas, that is, if it filed a plea in bar it waived every defect as to the jurisdiction and all matters of abatement. If it filed a plea in abatement, this acted as a voluntary and general appearance and waived any question as to the court's jurisdiction over the defendant. Perry on Common Law Pleadings, p. 420.

All of the cases lay down the rule that a plea in abatement in terms limited to a special appearance, waives

every question of the court's jurisdiction over the person, and operates as a general appearance giving the court jurisdiction over the person of such pleading defendant. *Elliot* v. *Lachead*, 1 N. E. 577; *Summit Lumber Co.* v. *Cornell Yale Co.*, 123 N. W. 444; *Perrine* v. *Knight Templars & Masons' Life Indemnity Co.*, 101 N. W. 1017. 2 *R. C. L.* Page 330, Section 9.

Defendant first moved to quash; simultaneously, filed double barrelled "pleas and motions"—reiterating the motion to quash, and coupling with it, what might have been thought to be a plea of *lis pendens*, but which in fact, with deference, was not so, but an entry of appearance with a prayer for stay. It set up, specifically,

> "*Wherefore, it prays judgment of the said writ and declaration and that the same may be quashed; or, if the court should be of opinion that the proper relief is not the quashing of the writ but a suspension of the proceeding, then and in that event that this Honorable Court will make and enter and order that this suit do stay and be suspended and respited until the said action so pending in the Southern District of New York should have been determined.*" (R., 38.)

Now these "pleas and motions" are irrevocably joined; there is therein but one prayer for judgment. The caption sets forth that the defendant "appears specially for the purpose of filing the *pleas and motions* hereinafter set out and for no other purposes." (R., 37.)

By this, defendant was in court just as effectually under the second subdivision as it was under the first, namely, irrevocably joining together a motion and plea of want of personal jurisdiction, and a motion and plea predicated upon the respite prayed until a definite and fixed time. The court held without serious controversy that by thus doing, as well as by conduct thereunder had, the defendant would have been in court, save and except he was saved by Section 523, Hem. Code of Mississippi, 1917, which provides:

"Several pleas in abatement. The defendant may *plead at the same time as many matters as he may have to the jurisdiction of the court, to the disability of the plaintiff, and in abatement of the writ or declaration;* and he shall set forth the matters *in separate pleas,* and in *plain, intelligible, concise language,* without regard to technical form; and *where the matter pleaded does not appear on record,* he shall *verify such plea by the oath or* affirmation of *himself or some other credible person.*"

This Section 523 is not here controlling, because,

Federal jurisdiction is not controlled or affected by the conformity statute.

Mankin v. *Bartley* (C. C. A.), 255 Fed. 466, is directly in point. Under the statute of Virginia the defendant might, in a state court, plead both in abatement and in bar, and the defendant so did in the Federal Court, and sought to challenge the jurisdiction of his person precisely as was here done; the declaration of the Court of Appeals was: that Federal jurisdiction was not altered in the state statute.

In *Munter* v. *Weil Faucette Co.*, 261 U. S. 276, 67 L. ed. 652, the court said:

"We have decided in cases which concern the jurisdiction of the Federal Courts that, notwithstanding the Conformity Act, neither the statutes of the States nor the decisions of its courts are conclusive upon the Federal Courts, the determination of such questions being 'in these courts alone.' *Mechanical Appliance Co.* v. *Castleman*, 215 U. S. 437, 443, 54 L. ed. 272, 276, 30 Sup. Ct. Rep., 125. The motion of Munter, therefore, should have been granted, and the action dismissed." *Mechanical Appliance Co.* v. *Castleman*, 215 U. S. 438, 54 L. ed. 274.

In *Western Loan & Savings Co.* v. *Butte & Boston Consolidated Mining Co.*, 210 U. S. 368, 52 L. ed. 1101, an action was brought in the Circuit Court in Montana by a citizen of New York which was dismissed for want of jurisdiction,

and whether that decision was correct is the single question carried direct to the Federal Supreme Court by writ of error; where the conformity statute was invoked, providing that:

> "The practice, pleadings, forms and modes of proceedings in civil causes * * * shall conform, as near as may be, to that in like causes in courts of the State wherein the proceedings are held."

But Mr. Justice Day said:

> "* * * nevertheless, in cases like the one under consideration, involving the jurisdiction of the Federal Courts, the ultimate determination of such questions is for *this court alone*."

There the Supreme Court reviewed the decision of *Mexican Cent. R. Co.* v. *Pinkney*, 149 U. S. 194, 37 L. ed. 699, wherein the Texas statute as to special appearance, precisely similar to our Mississippi statute, was held to be inoperative.

In the *Western Loan Co. Case*, the defendant, as permitted, by a local statute of Montana, filed a demurrer to the complaint, alleging:

> "1st, that the court has no jurisdictions of the subject of the action; 2d, that the court has no jurisdiction of the person of the defendant; 3d, that said complaint does not state facts sufficient to constitute a cause of action against this defendant; 4th, that the complaint is uncertain; 5th, that the complaint is unintelligible."

The district judge overruled this demurrer as to the first, second and third grounds, but sustained it on the 4th and 5th grounds, viz., that it was uncertain and unintelligible. Plaintiff then amended, and the defendant repeated the same grounds of demurrer, viz., those covering jurisdiction over the subject-matter of the action and jurisdiction over the person of the defendant. Thereupon, Judge Hunt, says Mr. Justice Day:

"* * * in a well-considered opinion, held that, inasmuch as the demurrer was interposed upon jurisdictional and other grounds, and was not confined to jurisdiction over the person alone, but reached the merits of the action, the case being one within the general jurisdiction of the court, although instituted in the wrong district, the defendant had waived its personal privilege not to be sued in the Montana district, and had submitted to the jurisdiction. In support of his view Judge Hunt cited *Interior Constr. & Improv. Co.* v. *Gibney*, 160 U. S. 217, 40 L. ed. 401, 16 Sup. Ct. Rep. 272; *Re Keasley & M. Co.*, 160 U. S. 221, 40 L. ed. 402, 16 Sup. Ct. Rep. 273; *Ex Parte Schollenberger*, 96 U. S. 369, 24 L. ed. 853; *Central Trust Company* v. *McGeorge*, 151 U. S. 129, 38 L. ed. 98, 14 Sup. Ct. Rep. 286; *St. Louis & S. F. R. Co.* v. *McBride*, 141 U. S. 127, 35 L. ed. 659, 11 Sup. Ct. Rep. 982; *Lowery* v. *Tile Mantel & Grate Asso.*, 98 Fed. 817; *Texas & P. R. Co* v. *Saunders*, 151 U. S. 105, 38 L. ed. 90, 14 Sup. Ct. Rep. 257. Thereafter, before any further steps were taken in the case the learned judge changed his ruling on the question of jurisdiction, and filed the following brief memorandum opinion:

'As neither party to this action was, at the time of the institution thereof, a citizen or resident of the State of Montana, upon authority of *Ex parte Wisner*, decided by the Supreme Court, December 10, 1906, and followed by the Court of Appeals of this circuit in *Yellow Aster Min. & Mill Co.* v. *Crane Co.*, 80 C. C. A. 566, 150 Fed. 580, and *Southern P. Co.* v. *Nurch, decided February* 11, 1907, 82 C. C. A. 34, 152 Fed. 168, I must reverse the ruling heretofore made by me upon the demurrer, and dismiss the case for lack of jurisdiction.'

'So ordered.'

Let us see, then, whether the defendant had submitted to the jurisdiction of the Circuit Court. It had appeared and filed its demurrer to the original complaint, invoking the judgment of the court, as hereinbefore stated, and the court had ruled against it on the question of jurisdiction, and upon the merits of the cause of action, only sustaining the demurrer as to the form of the allegations in the complaint. It invoked and obtained a ruling on the merits, so far as the legal sufficiency of the cause of action is concerned.

Then the amended complaint was filed. The court sustained its jurisdiction upon hearing the demurrer, which ruling is subsequently changed on the authority of *Ex parte Wisner*, which is now overruled *in Re Moore*, in so far as it was said in the Wisner case that a waiver could not give jurisdiction over a person sued in the wrong district, where diversity of citizenship existed.

So far from being obliged to raise the objection to the jurisdiction over its person by demurrer, as is contended by defendant in error, it was at liberty to follow the practice pursued in the code states under which sections similar to Section 1820 of the Montana Code, making a special appearance by motion aimed at the jurisdiction of the court over its person, or to quash the service of process undertaken to be made upon it in the district wherein it was not personally liable to suit under the act of Congress. This course was open to the defendant in the United States Circuit Court, as is shown by the case of *Shaw* v. *Quincy Min. Co. (Ex parte Shaw)*, 145 U. S. 444, 36 L. Ed. 768, 12 Sup. Ct. Rep. 935,—a suit in a district in the State of New York. In that case the parties were a citizen of Massachusetts and a corporation of Michigan, being citizens of states other than New York. A motion was made entering a special appearance for the purpose of setting aside the service. This manner of raising the question, it was held, did not amount to a waiver of the objection to jurisdiction. The same course was pursued with the approval of this court in *Re Keasbey & M. Co., supra*.

In *St. Louis & S. F. R. Co.* v. *McBride*, *supra*, the case, like the present one, arose in a code state. Suit was brought in the Circuit Court of the United States for the western district of Arkansas. The Arkansas Code, in respect to grounds of demurrer, is identical with the Montana Code. *Kirby's Digest* of the Statutes of Arkansas, 1904, p. 1285. Following the Arkansas Code, as the defendant in this case follows the Montana Code, the defendant filed a demurrer in language identical upon these points with the demurrer in this case. The demurrer reads: '1st. Because the court has no jurisdiction of the person of the defendant. 2d. Because the court had no jurisdiction of the subject-matter of the action. 3d. Because the

complaint does not state facts sufficient to constitute a cause of action.'

Of the effect of this demurrer Mr. Justice Brewer, delivering the opinion of the court, said:

'Its demurrer, as appears, was based on three grounds: Two referring to the *question of jurisdiction*, and the third, that the complaint did not state facts sufficient to constitute a cause of action. There was, therefore, in the first instance, a general appearance to the merits. If the case was one of which the court could take jurisdiction, such an appearance waives not only all defects in the service, but *all special privileges* of the defendant in respect *to the particular court* in which the action is brought.'

This case presents the same question. We are of opinion that the defendant had waived objection to jurisdiction over its person, and, by filing the demurrer on the grounds stated, submitted to the jurisdiction of the Circuit Court.

Judgment reversed."

There, under the Montana statute, this was proper pleading, but the Supreme Court pointed out that it should have entered its appearance specially and moved to quash the service, but that by joining in its demurrer several grounds, one as to the jurisdiction and another as to the merits it thereby did forego the objection to the jurisdiction and preclude itself from relying thereon. How much stronger is the case at bar?

In *Big Vein Coal Co.* v. *Read*, 229 U. S. 38, 57 L. Ed. 1056, Mr. Justice Day again declared:

"It is true that where the defendant appears by motion and objects to the jurisdiction, and also submits a question going to the merits of the action, it being one of which the court had jurisdiction, there is a general appearance in the case which gives jurisdiction, as in *St. Louis & S. F. R. Co.* v. *McBride*, 141 U. S. 127, 35 L. Ed. 659, 11 Sup. Ct. Rep. 982, where a demurrer was interposed raising two grounds of jurisdiction, and the third going to the merits of the cause of action, and it was held that there had been a submission to the jurisdiction of the court. See, also,

Western Loan & Sav. Co. v. *Butte & B. Consol. Min. Co.*, 210 U. S. 368, 52 L. Ed. 1101, 28 Sup Ct. Rep. 720."

St. Louis & S. F. R. Co. v. *McBride*, 141 U. S. 127, 35 L. Ed. 659, was an action to recover money between citizens of different states brought in the district and state of the residence of the plaintiff, the sum claimed being in excess of the jurisdictional amount. Thereupon the defendant—the record showing no process—interposed a demurrer on three grounds; "1st, because the court had no jurisdiction of the person of the defendant; 2d, because the court had no jurisdiction of the subject-matter of the action; 3d, because the complaint does not state facts sufficient to constitute a cause of action." The demurrer was overruled; plaintiff recovered, and the case went to the Supreme Court on the question of jurisdiction alone, as the judgment did not exceed five thousand dollars, and whether plaintiffs were entitled to recover was not a matter of jurisdiction, and said the court:

> "Assuming that service of process was made although the record contains no evidence thereof, and that the defendant did not voluntarily appear, its first appearance was not to raise the question of jurisdiction alone, but also that of the merits of the case. Its demurrer, as appears, was based on three grounds—two referring to the question of jurisdiction, and the third, that the complaint did not state facts sufficient to constitute a cause of action. There was, therefore, in the first instance, a general appearance to the merits. If the case was one of which the court could take jurisdiction, such an appearance waives not only all defects in the service, but *all special privileges of the defendant in respect to the particular court in which the action is brought.*"

Here we have a motion to quash, which was a perfectly proper pleading (except for the fact that this court's jurisdiction had been invoked by the defendant) and then pleas and motions irrevocably joined together, concluding with a prayer not a proper pleading in any common law state;

but the thing is entire. The absolute appearance thereby, even though the plea in abatement was a *lis pendens*, a plea in abatement, make it impossible for the defendant to question the jurisdiction.

In *Jones* v. *Andrews*, 10 Wall. 327, 19 L. Ed. 935, the defendant, a necessary party, sued in a district other than that of his residence, moved a dismissal on two grounds; 1st, jurisdiction; 2d, no equity, and Mr. Justice Bradley said:

> "* * * whether, if he had made the motion on the first ground alone he would have waived his personal exemption, it is not necessary to decide. His moving to dismiss for want of equity was clearly a waiver, and he was properly required to answer the bill. After this the question of jurisdiction over the person was at an end, and the decree of the Circuit Court, dismissing the bill for want of jurisdiction, must be reversed."

There is nothing in *So. Pac. Co.* v. *Denton*, 36 L. ed. 942, contrary, because as said:

> "*The jurisdiction of the Circuit Court of the United States has been defined and limited by the acts of Congress, and can be neither restricted nor enlarged by the statutes of a State.* *Toland* v. *Sprague*, 37 U. S. 12 Pet. 300, 328 (9: 1093, 1104); *Coules* v. *Mercer County*, 74 U. S. 7 Wall. 118 (19: 86); *Chicago & N. W. R. Co.* v. *Whitton*, 80 U. S. 13 Wall. 270, 286 (20: 571, 577); *Phelps* v. *Oaks*, 117 U. S. 236, 239 (29: 888, 889). *And whenever Congress has legislated upon any matter of practice, and prescribed a definite rule for the government of its own courts, it is to that extent exclusive of the legislation of the State upon the same matter.* *Ex parte Fisk*, 113 U. S. 713, 721 (28: 1117, 1120); *Whitford* v. *Clark County*, 119 U. S. 522 (30: 500). To conform to such statutes of a State would 'unwisely incumber the administration of the law,' as well as 'tend to defeat the ends of justice,' in the national tribunals. The necessary conclusion is that the provisions referred to, in the practice act of the State of Texas, have no application to actions in the courts of the United States."

The question of waiver of jurisdiction of the plaintiff is a question of Federal jurisdiction, and where it is a question of Federal jurisdiction, then that eliminates, for all time, State statutes.

In *Chatters* v. *Louisville & N. R. Co.*, 17 Fed. (2d Ed.) 306, Judge Burns said:

> "(2) The doing of a general freight and passenger business in Louisiana through other agents or agencies is otherwise alleged, and is admitted by the Southern Railway Company. The question directly presented is whether or not the jurisdiction of the United States District Court may depend upon state laws or judicial construction by state courts, and must be answered in the negative.
>
> "R. S. Sec. 721 (Comp. St. Sec. 1538), which provides that the law of the several states shall be regarder as rules of decision in trials at common law in the courts of the United States, in cases where they apply, except where the constitution, treaties, or statutes of the United States otherwise require or provide, prohibits the possibility of state legislation or judicial decision defeating the express statutory mandates of Congress. R. S. Sec. 914 (Comp. St. Sec. 1537), *the Conformity Act which provides that the practice, pleading, and forms and modes of proceeding in civil causes shall conform as nearly as possible to those of the courts of record in the state*, is beside the point. See, *Mexican Central Ry. Co.* v. *Pinkney*, 149 U. S. 194, 206, 207, 13 S. Ct. 859, 37 L. ed. 699.
>
> "(3) The exceptor's attack is leveled at the venue rather than the jurisdiction. *But the fact that this venue is established by Congress brings it under the prohibitive exception in R. S. Sec. 721, above referred to, so that the venue as well as the jurisdiction is cloaked with the authority of a statute of the United States, and therefore no state statute or judicial construction may be regarded here as a rule of decision.* The venue is established by Section 51 of the Judicial Code (Comp. St. Sec. 1033), which provides that, where jurisdiction is founded only on diversity of citizenship, the plaintiff may bring his suit at the place of his residence, or at that of the defendant, whilst the cause of action stated is within the general jurisdiction of this court as conferred by Section 24 of the

Code (Comp. St. Sec. 991). See *Munter* v. *Weil Corset Co.*, 261 U. S. 276, 277, 43 S. Ct. 347, 67 L. Ed. 652; *Mechanical Ap. Co.* v. *Castleman*, 215 U. S. 437, 443, 30 St. Ct. 125, 54 L. Ed. 272." (Italics ours.)

In *Hassler* v. *Shaw*, 271 U. S. 195, 70 L. ed. 900, the question is treated purely as one of jurisdiction.

Note, also, *Cain* v. *Commercial Publishing Co.*, 232 U. S. 124, 58 L. ed. 534, holding that in matters of jurisdiction the Federal rule was conclusive.

In *Frackman* v. *Lloyds*, 7 Fed. (2d Ed.) 620, it is said:

"This court is of the opinion that what amounts to a general appearance is to be determined by the Federal court independently of state statutes and decisions; that the Conformity Act was not intended to govern such questions; that all questions involving the jurisdiction of the Federal courts are to be determined by them without regard to state statutes and decisions. In *Munter* v. *Weil Corset Co.*, 261 U. S. 276, 43 S. Ct. 347, 67 L. Ed. 652, where the question of validity of the service was involved, the court said: We have decided in cases which concern the jurisdiction of the Federal courts that, notwithstanding the Conformity Act, neither the statutes of the states nor the decisions of their courts are conclusive upon the Federal court: the determination of such questions being 'in this court alone.' See, also, *Mechanical Appliance Co.* v. *Castleman*, 215 U. S. 437, 30 S. Ct. 125, 54 L. Ed. 272; *Cain* v. *Commercial Publishing Co.*, 232 U. S. 124, 34 S. Ct. 284, 58 L. Ed. 534; *Goldey* v. *Morning News*, 156 U. S. 518, 15 S. Ct. 559, 39 L. Ed. 517; *Mexican Central Railroad Co.* v. *Pinkney*, 149 U. S. 194, 13 S. Ct. 859, 37 L. Ed. 699. * * *"

In *De Lima* v. *Bidwell*, 182 U. S. 174, 45 L. Ed. 1047, there had been an action brought in the state court of New York, removed by the defendant, and the question of this removal to the Federal court was at issue, and the court there said:

"Did the question of jurisdiction raised by the demurrer involve only the jurisdiction of the Circuit Court *as a Federal court*, we should be obliged to say

> that the defendant was not in a position to make t
> claim, since the case was removed to the Federal co
> upon his own petition. It is no infringement upon t
> ancient maxim of the law that consent can not co
> fer jurisdiction, to hold that, where a party has pr
> cured the removal of a cause from a state court up
> the ground that he is lawfully entitled to a trial in
> Federal court, he is estopped to deny that such r
> moval was lawful if the Federal court could take jur
> diction of the case."

This underlying principle is fundamental. A state statu
may never interfere with the jurisdiction of the Feder
court. That is prescribed by the constitution and by Co
gress, and being prescribed by the constitution and by Co
gress, may neither be expanded nor contracted by sta
statutes. Federal jurisdiction is, therefore, not altered
the conformity statute. Were it alterable, then Mississip
statutes as an entirety must needs be considered, and the
would be no such thing as a special appearance. *Cain*
Commercial Publishing Co., 224 U. S. 124, 58 L. Ed. 52

So, if one of the idiosyncrasies of Mississippi's jurisd
tion on special appearances is accepted, the other must
taken at the same time. But so to do, the Supreme Cou
has expressly refused when a similar statute was broug
to its attention in Texas, just as it did when this preci
statute was brought to its attention in Mississippi. T
Supreme Court sits as sole arbiter of Federal jurisdictio

The rules of the common law as to jurisdiction over t
person were precise, logical; though the defendant mig
have pleaded these several pleas and motions at the sa
time, yet this permission did not confer upon the defenda
the further right to have a trial on the plea of *pendi*
suit while the plea of want of jurisdiction over the pe
son was still undetermined. •

In this cause (R., 65): "By Mr. Pillans, of counsel f
defendant": (before the hearing on the want of jurisd
tion over the person)

"*I am now in open court demanding of the plaintiff to know* if it be not a fact *that the action in the Southern* District Court of New York *brought by Morris & Company against* the Skandinavia Insurance Company, *and set up in the plea of lis pendens, has been,* since the *filing of that plea in this cause, dismissed out of the said court, and is now no longer a* pending litigation."

By Mr. Green:

"That is a fact"—

The defendant, without reservation as to personal jurisdiction, was in open court, and being in open court, in virtue of the court having jurisdiction of a pending cause, demanded the right to know of the plaintiff whether or not that cause in New York had been dismissed. The plea stated:

> "hence, and in that event, that this Honorable Court could make and enter an order that this suit *do stay and be suspended* and *respited* until the said action, so pending, as aforesaid * * * should have been determined."

It was incumbent upon the defendant to proceed, step by step, in the order fixed by the common law to adjudicate the rights prescribed. First, as to the jurisdiction of the court; next, as to the disability of the person of the plaintiff and next of the defendant; next, to the writ—first, for matter appearing on its face, and then for matter *de hors*.

By taking up *lis pendens* plea, without a determination of the prior plea of jurisdiction of the person, of necessity, the defendant, obviously, waived the modal objection, and was conclusively bound by the appearance.

In *McLean Lumber Co.* v. *United States*, 237 Fed., C. C. 46, it is said:

> "Furthermore, both the United States and the Commission, a voluntary defendant, have by their written motions, moved to dismiss the petition upon grounds based in part upon want of equity on its face, and going to the merits, without objection to the venue;

this latter objection having been subsequently made orally at the hearing in behalf of the United States to hear and determine a controversy, but merely to the local jurisdiction of this court, it is equal by analogy to the rule in cases where there is a general Federal jurisdiction by reason of diversity of citizenship, but want of local jurisdiction by reason of the residence of the parties (*Western Loan Co.* v. *Mining Co.*, 210 U. S. 368, 28 Sup. Ct. 720, 52 L. Ed. 1101) that the making of such defense upon the merits is a waiver of defect, if any there be, in the venue or local jurisdiction." Certiorari denied. 254 U. S. 32, 41 Sup. Ct. 7; 65 L. Ed. —.

See also:

Bester v. *Inter-County Fair*, 135 Wis. 341.

State ex rel. Hopman v. *Superior Court* (Wash., 1915), 153 Pac. 317.

Clark v. *Bankers Accident Co.* (1914), 96 Neb. 385.

The suit in New York had been dismissed and the court was bound to order the cause to proceed.

See, also:

Fulton v. *Ramsey et al.* (1910), 67 W. Va. 321.

McKillip v. *Harvey* (1907), 80 Neb. 266.

State v. *Grimm* (Missouri, 1912), 143 S. W. 484.

As pointed out in *Merchants Heat & Light Co.* v. *Clow*, 204 U. S. 286, 51 L. Ed. 488, the original plaintiff was an Illinois corporation, the defendant an Indiana corporation, and the question was whether the service of process was good, or, if not, whether there had been a waiver. In that suit the defendant set up a counter claim after it had made full reservation of its right as to jurisdiction, by reason of being a foreign corporation, and, as there said:

"* * * But by setting up its counterclaim the defendant became a plaintiff in its turn, invoked the jurisdiction of the court in the same action, and, by invoking, submitted to it (setting up its counterclaim).

Benedict v. *Seiberling*, 17 Fed. (2d Series), 1927, 841, states:

"The general rule is that any action on the part of a defendant which recognizes the case as in court, except to object to the jurisdiction over his person, will constitute a general appearance, and that, *if such act follows an attempt at special appearance only, waiver occurs of the claim of lack of jurisdiction of the person.* * * * *One who assumes the right of a party admits the effectiveness of the act which gives him that status. He thereby recognizes that an action is pending which involves him and in which he can have the relief asked only by appearing as a party thereto.*"

There is nothing in *Davis* v. *O'Hara*, 266 U. S. 314, 69 L. Ed. 303, *contra*, because in that case the action was brought in the District Court of Douglas County, Nebraska, and the Supreme Court was but following and administering the Nebraska law. On the contrary, it is expressly said:

"* * * This court is not bound by the decision of the state court that defendant waived his Federal right under the act and the order of the Director General, and it may determine for itself whether he sufficiently asserted and insisted upon that right."

As said in *Hammond* v. *District Court*, 39 A. L. R. 1497:

"In an unbroken line of decisions this court has said generally that any action on the part of defendant, except to object to the jurisdiction over his person, which recognizes the case in court, amounts to a general appearance, and gives the court the same jurisdiction as though process had been regularly served in the manner and form, and for the length of time, prescribed by law. (Cases.) * * *

"In the expression 'which recognizes the case as in court,' as used in some if not all of these several cases, means that it recognizes the case as pending in court, with jurisdiction of the subject-matter and of the parties. In order to do this, the defendant must seek some affirmative relief at the hands of the court, or he must ask a favorable decision upon some matter of a substantive character, or endeavor to secure a continuance or postponement. The reason underlying the doctrine is that no such action can be taken without the court possesses jurisdiction over his person, and he is

> not entitled to any such affirmative relief or favorable ruling unless the court possesses jurisdiction over his person, and when he seeks such relief, he necessarily assumes the attitude that such jurisdiction has been acquired, and having taken that position, he is bound thereby, and will not be heard afterwards to say otherwise."

Thus, having invoked the adjudication of the court of this plea, and specifically had it acted on before the question of personal jurisdiction was determined, of necessity, the invocation was a waiver of the highly technical plea sought to be interposed (of want of personal jurisdiction in the court) when "in open court" a demand was made of the court to so adjudge.

This plea or motion only sought that there be "a suspension of this proceeding." "This Honorable Court will make and enter and order that this suit do stay and be suspended and respited until the said action so pending as aforesaid * * * should have been determined." By proceeding "in open court" had at defendant's instance, this New York suit was shown to have been suspended, and not only suspended but suspended in virtue of an election made due to the interposition of this specific objection. So, that the specific objection here interposed would become and be without force.

This occurred, under an invocation of jurisdiction by defendant before determination of the motion to quash. The court had to enter an order on this application, which, by defendant's pleading, could have only been that the suit *do forthwith proceed*, because the time for the suspension had expired. The defendant was bound by its pleading; the court was bound to enter an order on this, and such an entry of such an order, under the invocation could only have been that the court proceed because the suit in New York no longer opposed an obstacle to the determination here. The court could not disregard and treat as moot this entry of appearance. Under its terms this action could

no longer be *suspended, stayed and respited.* That condition having happened, then the obvious duty of the court imperatively demanded that the court proceed under this motion, because the defendant had only asked that the suit be *stayed, suspended and respited* until this should occur, and having occurred, all asked would have been obtained.

The defendant expressly invoked the jurisdiction of the District Court, as a court, for the exercise of its judicial power in this pending suit whereover the court had jurisdiction to do a definite act—not to throw the suit out as improperly brought, whereof the court could have no jurisdiction—far from it—(the request admits competency of the court as a court at the instance of the defendant as a party litigant in a pending suit to grant the relief sought), but sought solely relief from being twice vexed. The order, when plaintiff had dismissed the New York suit, must have been—

> "This cause having been considered by the court, and the defendant having herein appeared and moved that in this cause this suit be stayed, suspended and respited until the determination of the New York suit, and it appearing, in virtue of this plea so thus interposed, that the plaintiff has dismissed said New York suit,
>
> "Now, therefore, it is hereby ordered and adjudged that having so appeared and invoked the jurisdiction of this court and said New York suit being now dismissed, that this suit do forthwith proceed to a hearing thereof on the merits."

The statutes in Virginia, permitting the same practice, specifically prescribe that the pleas must be determined in the order in which they should have been interposed under the common law.

In Mississippi the law is the same, because this innovation upon the rules of the common law did not alter it further than in the matter of the interposition of the pleas (*Edwards* v. *Gaulding*, 38 Miss. 118; *Hollman* v. *Bennett*, 44 Miss 322), and did not allow the litigant to litigate the pleas in an order other than that which had been deter-

mined by the common law. The requirement of the *separate* interposition connoted a preservation of the *precedent practice*, and required that one who therefrom varied should waive as at common law.

Thus, under the procedure had this must be considered a waiver of the modal objection that no jurisdiction obtained over the person.

Wherefore, the writ should issue and the record be certified for consideration by this court, because,

(a) Defendant contracted to be sued in Mississippi on both local and foreign causes of action, accruing both before and after qualification.

(b) Because defendant, by qualification in Mississippi became a domestic corporation.

(c) Defendant, by doing a re-insurance business, otherwise not permissible, except by qualification, did business and became subject to suit.

(d) Defendant, a non-resident, when sued by plaintiff, a non-resident, in the State of Mississippi, voluntarily entered an appearance by removing to the local Federal District Court.

(f) Defendant appeared by entering a plea of *lis pendens*, and Section 523, Mississippi Code, not operative to divest Federal jurisdiction.

Respectfully,

By JOHN M. LEE,
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CHALMERS POTTER,
SIDNEY MIZE,
Attorneys for Petitioner.

We file the Brief used in the Court of Appeals wherein statutes are quoted, decisions excerpted and discussed at greater length than here allowed.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D., 1928

No. 450

MORRIS AND COMPANY, et al,

Petitioners

vs.

SKANDINAVIA INSURANCE COMPANY

Respondent

BRIEF FOR RESPONDENT

PALMER PILLANS,
JAS. A. LEATHERS,
for Respondent.

Bigham, Englar and Jones
Pillans, Cowley and Gresham,
Leathers and Sykes,
of Counsel.

There was no opinion delivered by Judge Holmes at the trial of the instant case in the District Court.

The opinion of the Circuit Court of Appeals is reported in 27 Fed. (2nd), 329-30.

SUPPLEMENTAL STATEMENT OF THE CASE.

For convenience of reference, the petitioner, who was plaintiff below, will in this brief be referred to ordinarly as "plaintiff"; and the respondent, who was defendant below, as "defendant".

In order that the Court may have a complete picture, it seems advisable to supplement somewhat plaintiff's statement of the case.

The insurance policy sued on is set out at pages 5-9 of the record. It appears therefrom, as well as from the declaration itself (Rec. pp. 3-4) that the insurance was contracted for at Buenos Aires to cover the carriage of certain dried beef from Montevideo, on the River Plate, to Havana. The contract was executed on July 11th, 1918. The declaration shows that the bill of lading, covering the insured beef, was issued on May 20, 1918; the policy issued on July 11, 1918; and that the loss is claimed to have hapened on May 23rd, 1919.

By the terms of the policy (Rec. 7) any claim growing out of the policy was payable in Buenos Aires.

Thereafter, on November 15, 1921, Messrs. Morris & Co. brought an action *in personam* in admiralty against the Skandinavia Insurance Company, in the District Court of the United States for the Southern District of New York.

The Skandinavia Insurance Company had an office in New York City (record 117) which this Court judicialy knows is within the Southern District of New York. At that office apparently were sundry persons representing the Skandinavia Insurance Company and readily amenable to process. It would seem that no difficulty should have been experienced in procuring personal service on the Skandinavia Insurance Company in the Southern District of New York. Apparently none was experienced, as the said admiralty action not only was

brought there but it was prosecuted (or languished—the record doesn't show which) from time of its bringing, noted above, to April 16th, 1925, when the present action was commenced at Law in the Circuit Court of Harrison County, Mississippi.

After the Mississippi Suit had been brought, had been removed to the Federal Court and had been pending well on toward two years, the plaintiff finally dismissed his New York action.

It might be fairly thought, it would seem, that the District Court of the United States for the Southern District of New York is reasonably competent to hear and determine a controversy over a policy of marine insurance. There was no difficulty in securing proper and valid service of process there, and the cause was actually pending in the Court for a number of years. Why plaintiff developed a desire to abandom an action in which he certainly had service and before a Court experienced in that character of controversy, for an effort that has now lasted some three years without yet getting across the threshold of another court; the record does not explain.

These efforts by a citizen of one soveriegn to sue a citizen of another sovereign in the forum of still a third soveriegn, are by no means uncommon. The decisions of our courts are studded with instances. Where defendant has thought that there was no jurisdiction of his person, as did defendant in the case at bar, the ordinary practice in the Federal Courts has been to move to set aside and quash the summons and service and to dismiss the suit. Illustrations are *Conley vs. Alkali Works*, 190 U. S. at 407, 409; *St. Louis Railway vs. Alexander*, 227 U. S. at 223; *Chipman, Limited, vs. Jeffery*, 251 U. S. 373, at 376.

Mississippi has provided a statutory method for the raising of jurisdictional questions. It is contained in

Section 537 of Hemingway's Mississippi Code of 1927. It reads thus:

> "537 (523) *Pleadings — Several Pleas in abatement—Judgment to be 'respondent ouster' and not 'quod recuperet.*,—1. The defendant may plead at the same time as many matters as he may have to the jurisdiction of the court, to the disability of the plaintiff, and in abatement of the writ or declaration; and he shall set forth the matters in separate pleas, and in plain, intelligible, concise language, without regard to technical form; and where the matter pleaded does not appear on record, he shall verify such plea by the oath or affirmation of himself or some other credible person; and in the event the plaintiff takes issue on the plea in abatement and it is found in his favor, he shall have judgement respondeat ouster and not quod recuperet, and the defendant shall thereupon be entitled to plead to the merits as if no plea in abatement had been interposed, and the trial shall proceed as in other cases."

This statute seems to indicate that under the Mississippi practice, one must *plead* to the lack of jurisdiction rather than raise the question by motion to quash; and, further, that it is the legislative thought that cases should not be strung out by the successive interposition of pleas to the jurisdiction and of dilatory pleas, but that all should be pleaded and disposed of together and at the same time.

In the *instant* case defendant pursued both courses; it moved to quash the atempted service and to dismiss the cause for want of jurisdiction over the person of the defendant (Rec., 35-36); and it filed two *distinct* pleas. (Rec., 37-39).

These pleas are not only wholly distinct in thought,

but they are separated into paragraphs and are numbered respectively "I" and "II" in Roman numerals.

The motion and the two pleas, were filed on November 27th, 1925, within the pleading time after the removal of the cause to the Federal Court.

When the matter came on to be heard, it was the opinion of the learned trial judge that the proper method to raise the question of jurisdiction, was by pleading pursuant to the Mississippi statute, and that the motion and the plea should be merged and treated as a plea, in response to which evidence would be heard and the matter examined as with any other plea. (See second paragraph in Judge Holmes' order of March 4th, 1927, Rec. p. 68.)

At the time of the writing of the policy sued on in the declaration, the Skandinavia Insurance Company wrote direct insurance, but it subsequently abandoned this branch of underwriting and became a re-insurance company solely. Such was its business, and its only business, throughout the period of time covered by the controversy over the question of jurisdiction, that we are now concerned with.

With reference to plaintiff's insistence that defendant was doing business in Mississippi, perhaps it may not be amiss to reduce to narrative form that portion of the testimony of Mr. Geberth, which deals with reinsurance and its relation to doing business in Mississippi by the Skandinavia Company; and that part of Mr. Hardy's testimony which had to do with doing business in Mississippi by the Skandinavia Company.

> *Mr. Geberth*: I am Assistant Manager of the Skandinavia Insurance Company, Ltd., of Copenhagen, Denmark; for the United States, having been appointed to that office on August 5th, 1924, and been in that position ever since. My chief duty is supervising the writing of insurance in the United States for my Company.

During the time that I have been Assistant United States Manager for this company, the Skandinavia Insurance Company, Ltd., has had no transactions through Messrs. R. C. Wilkerson, Inc., or anyone else, within the State of Mississippi and has not transacted any business in the State of Mississippi through either R. C. Wilkerson, Inc., or anyone else.

The Skandinavia Insurance Company was not doing business in Mississippi on April 17th, 1925, and has not done any business within the State of Mississippi since that date.

Throughout the time that I have been Assistant United States Manager, and up to and including the present time, the nature of the business of the Skandinavia Company has been the business of re-insurance. The Company has not been writing any direct insurance during that period.

The business of re-insurance is transacted thus: The re-insuring company takes over surplus lines or participation lines from the direct writing company. The direct-writing company writes policies on property physically located within the United States—fire insurance on houses and property. The Skandinavia Insurance Company re-insures the direct-writing company. *The contracts of re-insurance were executed in the New York Offices of the Skandinavia Insurance Company, Ltd., or in the office of the ceding company.* By ~~real-writing fire insurance companies which have~~ "ceding company," I mean the direct-writing company. In such re-insurance contracts or treaties, the Skandinavia Company agrees to reimburse the direct-writing company for losses incurred by it on risks reinsured with the Skandinavia Company. Properties insured by the direct-writing company are located anywhere in the United States and di-

rect-writing fire insurance Companies which have

treaties with the Skandinavia Company may have issued policies on property physically located in the State of Mississippi. Under the terms of the re-insurance treaties entered into by the Skandinavia Company with direct-writing companies, the Skandinavia Company does not select the risk, with respect to the physical location of the property—all re-insurance is done under contract and the re-insurance company has no choice in the matter.

The Skandinavia Company has never had any transactions of re-insurance with any insurance company which has or had its home office within the State of Mississippi, and has never had any transaction of re-insurance under or pursuant to the laws of the State of Mississippi.

With reference to my statement that some of the direct-writing companies, which had re-insurance treaties with the Skandinavia Company, may have issued policies on properties physically located within the State of Mississippi, I would say that no re-insurance transactions, with respect to such risks, were had within the State of Mississippi, but were had outside the State of Mississippi.

All the Skandinavia Insurance Company, Ltd., did in the State of Mississippi, was the filing of the annual statement with the Insurance Department of the State of Mississippi; reporting such business as was transacted in general by the Skandinavia Insurance Company, which means the General Annual Statement reporting the risks which it had re-insured and which risks were written by the direct-writing company located in the State of Mississippi.

Robert C. Wilkerson, Inc., of Vicksburg, Mississippi, was what is known as a nominal agent,

and had no authority to write any business whatever. During the time I have been connected with the Skandinavia Company, it has had no agent in Mississippi other than Robert C. Wilkerson, Inc. (Rec. 116-121.)

(It will be understood that this does not purport to be a quotation, but is simply putting in narrative form, in the first person the witness' testimony.)

Mr. Hardy: I am a member of R. C. Wilkerson, Inc., and have been for sixteen and a half years. I know the Skandinavia Company, and have used their name as agents. Our first connection with them was the receipt of a letter from Messrs. Metzenbecher & Ballard (at that time general agents in New York for the Skandinavia Company) requesting that they be allowed to designate the R. C. Wilkerson Company as agents for a number of companies in Mississippi. My firm acquiesced, and outside of that, all I know is that they sent us a check for $5.00 (this is erroneously printed "$5,000.00" in the record) for each of the companies; and that was all the correspondence and all the dealings this house had with the Skandinavia Company.

Subsequent to that time the Skandinavia Company left Mississippi with a lot of the other big companies, and we heard nothing more until the companies came back in 1923, when Messrs. R. C. Wilkerson Company resumed the same relationship as before with the Skandinavia Company.

The sole communication that we had with them had to do with re-insurance; there was no direct insurance writing or writing of direct risks, that I know of. During the entire period of time that the said relationship existed between R. C. Wilkerson, Inc., and the Skandinavia Company,

Wilkerson, Inc., has never at any time written any business in Mississippi for The Skandinavia Company, nor has any agent or representative of Wilkerson, Inc., ever written any contract of insurance of any character, either directly or indirectly, either direct insurance or indirect insurance, in Mississippi for the Skandinavia Company.

Reinsurance is insurance which the insurer itself takes out on its liability on certain risks—it insures its excess lines. For instance, when a company writes a policy for ten thousand dollars on a building and wishes to cary only twenty-five hundred dollars of its risk, that company insures afresh the balance of the risk as re-insurance. The re-insuring company doesn't insure the original assured but insures the original insurer. At no time throughout the period of R. C. Wilkerson & Company, Inc., representation of the Skandinavia Company, has the Skandinavia Company written even that character of insurance through our office in Mississippi. As far as my personal knowledge goes, the Skandinavia Insurance Company has not made any contracts, either direct or re-insurance, through any office other than our office in Mississippi. Throughout the time that I have been testifying about, our Company has not been authorized by the Skandinavia to write any insurance, either direct or re-insurance, in Mississippi. (Rec. 124-126)

The reason that the Skandinavia Insurance Company qualified to do business in Mississippi in accordance with the laws of the State of Mississippi, notwithstanding that it wrote no insurance and did no business in Mississippi, clearly appears from the letter written to Mr. Henry (the Mississippi Insurance Commissioner, uniformly referred to by the Chicago compositor, who set up the record, as "Henery") under date March 16,

1923 by Mr. Ehmann, at that time Assistant United States Manager (the predecessor to the witness Geberth); and from Sec. 5865 of Hemingway's Mississippi Code of 1927 (Sec. 5070 of Hemingway's Mississippi Code of 1917.) The said Section reads thus:

> "5865. (5070) License or renewal. Whenever an application for license, for renewal of license, or for admission to this state, is made by a company, whether of this state or another state of the United States, or of a foreign country, for the transaction of business of fire insurance herein, such company shall, as one of the prerequisites of admission, file a sworn declaration signed by its president and secretary, or officers corresponding thereto, *that it will not reinsure any risk or part thereof taken by it on any property located in Mississippi with any company not authorized to transact the business of fire insurance in this state;* provided that when all efforts have been exhausted and fail to place the entire line of needed reinsurance on any one risk in companies authorized to do business in this state which have representatives in the community authorized to bind such companies, at the same rate as offered by other sovlent companies, the excess may be written in companies not thus authorized. In all such cases an affidavit shall be filed by the company, or its agent, within one month from the date of placing such reinsurance with the insurance commissioner of this State, giving complete list of the companies applied to for reinsurance, with the amounts accepted by each of those authorized to do business in the state, and a list also of the companies writing the excess herein provided for, with the amounts written by them respectively, and this affidavit shall be open for public inspection; provid-

> ed, further, that companies shall not be required to offer any portion of the needed reinsurance to any company which is, or has within the preceding twelve months been in an impaired condition. Reinsurance premiums paid to companies authorized to do business in Mississippi may be deducted from gross premiums in the semi-annual tax returns, when affidavits are furnished from such authorized reinsuring companies that the amounts so deducted are included in their own semi-annual tax returns, and are paid on by the authorized reinsuring company." (Our emphasis.)

It will be noted that by the terms of the said statute, no direct-writing company can procure, or renew, a license to do business in Mississippi or write any risks therein without making oath that it will not reinsure in any company not authorized to do business in Mississippi. Consequently any reinsurance company desiring to reinsure direct-writing companies which have written risks located in Mississippi, must itself (the reinsuring company) *qualify* to do business in Mississippi though it may intend to do none and in fact do none.

The said letter from Mr. Ehmann to Mr. Henry, is set out on page 139 of the Record. Note the opening paragraph thereof:

> "This Company being desirous of re-entering the State of Mississippi *for the purpose of transacting a fire reinsurance business under treaties with direct writing companies authorized to transact business in your state*, we shall consider it a favor if you will be kind enough to advise us whether it will be sufficient for this purpose for us to file with you an annual statement for the year ending December 31, 1922, together with the necessary fees in connection therewith."

The publications in the *Clarion Ledger* of the condensed statements of the Skandinavia Insurance Co. (one of which, together with the testimony of the witness Manar, is set out at pages 135-6 of the Record) were caused to be published, not by the defendant but by the Insurance Department of the State of Mississippi. The payments made therefor were made by the Insurance Department though with money sent to the Insurance Department by the Skandinavia Insurance Company. See Record 137, where it also appears that the statements were not sent by the Skandinavia Insurance Company to the newspaper, but were sent by the Skandinavia Company to the Insurance Department.

In plaintiff's brief in this Court there persists the same insistence made on the trial of the cause in the District Court, and in argument and brief in the Circuit Court of Appeals, touching re-insurance. It seems to be either a curious confusion of thought, or a complete misconception of the position of the defendant. On page 3 of petitioner's brief in this Court, it is asserted that, after issue joined and a jury empaneled,

> "it appeared that the defendant did only a *re-insurance business* (the emphasis is copied just as it is in the brief) in Mississippi, which aggregated, however, more than $4,000,000 * * * * * in one year; premiums aggregating more than $60,000."
>
> To the quoted statement petitioner cites "(R. p. 224)"

There is no such page in the Record. Apparently the reference is intended to be to page 180 of the Record. In plaintiff's attempt to show the doing of business by the Skandinavia Insurance Company in Mississippi, plaintiff put in evidence the annual statements filed with the Insurance Commissioner by the Skandinavia Insur-

ance Company pursuant to law as a part of the qualifying in the State. The offer is shown at page 169 of the Record. A condensed summary of the statements, with an exact copy of those parts which the plaintiff deemed material to have in the Record *verbatim*, runs from p. 169 to p. 182, inclusive.

These annual returns, were, as noted, made as a part of the requirements of the Mississippi statutes touching admission, and had to be complied with, as hereinbefore pointed out, in order to enable the Skandinavia Company to re-insure direct-writing companies which had underwritten risks physically located in Mississippi. The apposite statutes are *Sections* 5866, 5876 *and* 5877 of *Hemingway's Mississippi Code of* 1927. (Being, respectively, Sections 5071, 5081 and 5082 of Hemingway's Mississippi Code of 1917). As no question arises touching the construction of these statutes, nor any debate as to them, we daresay that it is not necessary to set them out *in haec verba* but that it will suffice to state succinctly their tenor.

Section 5866 requires annual returns as to reinsurance; Section 5877 requires returns by fire insurance companies as to their business generally; and Section 5876 requires the Insurance Commissioner, in December of each year, to furnish to each insurance company authorized to do business in the state, two or more blanks adapted for their annual statement. Each of the statutes requiring returns, requires that the returns shall be made to the Insurance Commissioner in such form and detail as may be prescribed by him.

The Insurance Commissioner does require returns to be made in great detail upon elaborate printed forms. These returns made by the Skandinavia on these forms, were put in evidence for the years 1923, 1924 and 1925. It is these returns which are summarized in the Record. The original returns were before the Circuit Court of Appeals on certificate up from the trial Judge. Every-

thing in them is printed except the filling in of the figures.

The whole testimony touching the business done by the Skandinavia Company, is that already hereinbefore summarized from the depositions of Messrs. Geberth and Hardy. There can't be any dispute over what was done. What is intended to be asserted by the petitioner, is that what was done "situsedˮ (petitioner's word) the re-insurance business in Mississippi although done wholly without the State. It seems advisable to draw attention to this as otherwise one might be misled, by the statement quoted from petitioner's brief, to think that the Skandinavia Company was actually doing a re-insurance business within the State of Mississippi.

This same re-insurance thought appears twice again in plaintiff's brief as "Point IIIˮwhich is set out in identical phraseology on page 16 and again on page 29. This is the language:

> "When defendant's qualification in Mississippi was for a complete transaction of business, its voluntary election to do only a certain portion, would not confer immunity from suit."

At no time has defendant contended, in any court, that doing the business of re-insurance was not a "doing business". What was urged by defendant, and found both by the trial judge and by the Circuit Court of Appeals for the Fifth Circuit, was that there was no writing of *any* insurance, re-insurance, or otherwise, within the State of Mississippi—no business of any sort done within the State. Apparently the thought attempted to be asserted by the plaintiff, is that we claimed that because we were reinsurers, as distinguished from direct insurers, therefore we were not subject to suit. No such contention has been made.

On page 4 of plaintiff's brief, there appears this:

> "Defendant further showed compliance with Section 5073 Mississippi Code, providing: All foreign companies must make 'a deposit * * * * * *in exclusive trust for the benefit and security of all the Company's policy holders and creditors in the United States * * * * * *'." (The emphasis is copied from plaintiff's brief.)

Again, at pages 9-10 of plaintiff's brief, it avers that the defendant

> "had specifically made a deposit under Section 5073 of Hemingway's Code of 1917 * * * of a sum not less than the capital required of like companies under this chapter * * * * * in exclusive trust for the benefit and security of *all the Company's policy-holders and creditors in the United States.*" (Plaintiff's emphasis).

It is thought that one would get the impression, from these statements, that the Skandinavia Insurance Company had made in Mississippi a deposit for the benefit of policy-holders and creditors. Such is not the case. In the deleted matter indicated by the stars in the quoted matter from plaintiff's brief, is contained an important portion of the statute, bearing on this particular thought. The Section is short and we set it out in full:

> "5868 (5073) DEPOSIT REQUIRED OF COMPANIES OUTSIDE UNITED STATES. Such foreign company, if incorporated or associated under the laws of any government or state other than the United States or one of the United States, shall not be admited until, besides complying with the conditions of section 5864, it has made a

> deposit with the treasurer of the state, or with the financial officer of some other state of the United States, of a sum not less than the capital required of like companies under this chapter. Such deposit must be in exclusive trust for the benefit of all the company's policy-holders and creditors in the United States, and may be made in the securities but subjected to the limitations specified in section 5841, and such deposit shall be deemed for all purposes of the insurance law the capital of the company making it."

It will be noted that the deposit to be made by a foreign company, may be made with the treasurer of the State of Mississippi *or with the financial officer of some other state of the United States.* In the instant case the deposit was actually made in the state of New York. This appears in the Record at page 135 in the statement furnished by the Skandinavia Insurance Company to the Insurance Department of Mississippi and published by that Department in the Jackson *Clarion Ledger*, a daily newspaper. From that it appears that the Skandinavia Company had deposited *with the New York Insurance Department* $400,000, which became, for the purposes of the Mississippi insurance statutes, the capital of the company making the deposit.

SUMMARY OF THE ARGUMENT

I.

In numerous decisions, extending over a period of years, this Court has worked out a formula of principles governing the grant or refusal of petitions for writ of certiorari. It may be stated thus:

(a) The question involved must be one of peculiar gravity and general importance.

Lau Ow Bew, Petitioner, 141 U. S., 583 at 587-88.
In re Woods 143 U. S., 202 at 205-6.
Forsyth vs. Hammond, 166 U. S. 506.
Fields vs. United States, 205 U. S. 292.
Hamilton Shoe Co. vs. Wolf Bros., 240 U. S., at 258.
Houston Oil Co., vs. Goodrich, 245 U. S., 440 at 441.
Layne Corporation vs. Well Works, 261 U. S. 387 at 388, 393.

or

(b) There must be a real and embarrassing conflict of opinion and authority between two or more of the Circuit Courts of Appeal or between Circuit Courts of Appeal and the Courts of a State.

Forsyth vs. Hammond, 166 U. S. 506.
Fields vs. United States, 205 U. S. 292.
Hanover Milling Co. vs. Metcalf, 240 U. S. 403.
Layne Corporation vs. Well Works, 261 U. S. 387 at 388, 393.

What is a question of peculiar gravity and general importance, is illustrated by the *Lau Ow Bew case*, where there was involved the construction of the Chinese Exclusion Act and its consideration *in pari materia* with our treaty with China—public questions involving important international relations. Or by *Sandberg vs. McDonald* (248 U. S. 185), and its companion cases, which involved the construction of an important Act of Congress, sought to be applied to things done abroad.

On the other hand, what are not questions of such gravity and general importance, is illustrated, among the cases hereinbefore cited, by *in re Woods*.

As this Court said in a recent pronouncement on this subject:

"It is very important that we be consistent in not

granting the writ of certiorari except in cases involving principles the settlement of which is of *importance to the public as distinguished from that of the parties* * * *."*

Layne Corporation vs. Well Works, 261 U. S. at 393.

II.

In its recent revision of its Rules, this Court has summarized the result of these holdings, in paragraph 5 of Rule 38. This paragraph 5 divides into three groups the general character of questions which will be considered in the granting of writs. These groups are lettered respectively, (a), (b) and (c). Groups (a) and (c) have no application here. If petitioners have a case which should be brought up, it must lie under some one of the heads contained in group (b); which group, we take it, would be considered in connection with the decisions of the Court cited to Point I, hereinbefore.

III.

On page 5 of plaintiff's brief are set out the grounds on which the issue of the writ is sought. They are three in number as stated by plaintiff, but involve, it would seem, four thoughts; which may be thus restated:

(1) That what plaintiff styles defendant's "contract of qualification" conferred jurisdiction of all causes of action, whether arising within or without the State of Mississippi and whether the defendant was or was not doing business within the State of Mississippi.

(2) That if the first position be unsound; and if it be requisite, to jurisdiction, that the defendant must have been doing business within the State of Mississippi at the time suit brought; then that the business of re-insurance done by the defendant as disclosed by the Record, was a doing of business within Mississippi.

(3) That the defendant, by removing the cause from the State to the Federal Court, effected a general appearance in the Federal Court, which waived want of jurisdiction and brought the person of the defendant into the Federal Court for all purposes.

(4) And that the Circuit Court of Appeals for the Fifth Circuit, in giving effect to the Mississippi pleading statute (Sec. 537 of Hemingway's Mississippi Code of 1927—Sec. 523 of the 1917 Code), decided in conflict with a decision of the Circuit Court of Appeals for the Fourth Circuit.

We shall discuss these contentions in the order in which we have grouped them, which follows the order in which they are put by plaintiff.

IV.

The law touching the effect of service of process on an agent-for-process under State agent-for-service statutes, is clear and unambiguous, and is settled by repeated decisions of this Court. It may be thus stated:

While a state may require of a foreign corporation that, as a condition to qualify, it must enter into an agreement, to accept, as valid, service of process on some person especially designated for this purpose, this agreement has no application to the service of process in a cause arising out of a transaction had without the State —a cause of action arising without the State— unless the statute itself so specifically declares, or unless the court of last resort in such State has so construed its agent-for-service statute.

St. Clair vs. Cox, 106 U. S. at 356.
Old Wayne Life Assn. vs. McDonough, 204 U. S. 8, at 14, 18-19, 21, 22, 23.
Hunter vs. Insurance Co., 218 U. S. 573, at 579-80, 586, 587, 588.

Simon vs. Southern Ry. Co., 236 U. S. 115, h. n. 11 and opinion at 130, 132.
Robert Mitchell Furniture Co., vs. Construction Co., 257 U. S. 213, at 215, 216.

V.

There is no Mississippi statute specifically declaring that the agent-for-service statute of that State is intended to apply to causes of action arising without the State; nor is there any decision of the Court of last resort construing the statute to cover such. The statutes and Mississippi decisions relied on by the plaintiff, were collated and set out in its brief in the Circuit Court of Appeals. It is thought that no good purpose would be served, in a brief of the summary type required by this Court on petition for the grant of a writ, to set out in detail the statutes and decisions. They were discussed at large by both parties before the Court of Appeals. Suffice it to say, with the Court of Appeals:

> "It may be conceded that if the statutes of Mississippi requiring appellee to appoint agents in Mississippi made service on those agents good as to a transitory cause of action arising elsewhere, appellee would be barred thereby, but we find nothing in the laws or jurisprudence of Mississippi going to that extent."
> (Record 206.)

VI

We take it that plaintiff concedes that if it be wrong in its insistence as to the ground covered by its first proposition relied on for the issue of the writ, then there was no jurisdiction in the first instance unless the Skandinavia Insurance Company was doing business in Missis-

sippi. Plaintiff's insistence is that the defendant was so doing on the facts shown in the Record.

It is thought that a reading of the testimony should negative this insistence, without reference to adjudged authority. If desired, however, reference may be had to

Conley vs. Alkali Works, 190 U. S. 406.
Peterson vs. Ry. Co., 205 U. S. 364.
Green vs. Ry. Co., 205 U. S. 530.
Hunter vs. Ins. Co. 218 U. S. 573.
Philadelphia & Reading Ry. Co., vs. McKibbin, 243 U. S. 264.
Chipman vs. Thos. Jeffery Co., 251 U. S. 373.
Robert Mitchell Furniture Co. vs. Construction Co. 257 U. S. 213.

VII

Plainitff's contention that, by filing a petition for removal from the State to the Federal Court, the defendant effected a general apearance and could not thereafter in the Federal Court, object to the jurisdiction of the person; is precisely ruled against it in

General Investment Co. vs. Lake Shore Ry. Co., 260 U. S. 261, head n. 3, Opin, at 268-9;
Wabash vs. Brow, 164 U. S. 271, see brief of defendant in error, at 273-4, and Opin. at 276,279.

Plaintiff's contention is grounded on a line of cases headed by the overruled case of *ex parte Wisner*, 203 U. S. 449 That case, and the other cases of similar tenor cited in plaintiff's brief, all follow the now discredited notion that a removal could not be had of a cause which would not have lain in the removal court in the first instance. The waiver idea is based on this chain of reasoning: That, if the Federal Court

cannot entertain jurisdiction of the removed cause because it could not have entertained jurisdiction if the cause had been brought there in the first instance, and the cause be removed to the Federal Court by a petition filed by the defendant; then the defendant, being in the Federal Court, cannot have the cause dismissed because the suit could not have originally been brought in the Federal Court. This position is manifestly sound, if the premise to taken as sound. If that were law, it would render impracticable the maintenance of the action because it could be removed ,under the removal statute, out of the State Court and then dismissed out of the Federal Court. No further argument is needed to indicate how wholly inappropriate such line of reasoning is to the situation existing here. The thought insisted on by the defendant in the instant case, and justified by the authorities, is that the defendant has not been brought properly into *any* Court by proper service of process. This is applicable equally to the State Court or the Federal Court. There is no waiver of this by removal from the State to the Federal Court. Not only must this be true on reason and principle, and wholly without the line of thought in the removal cases; but, as hereinbefore pointed out, it has been expressly and repeatedly ruled in the Supreme Court in cases removed from the State to the Federal Court and the jurisdiction of the person attacked in the Federal Court because of defective service.

While this Court, of course, is familiar with the history of *ex parte Wisner*, yet for convience of reference we would say that the decision which finally and definitely and completely destroyed it, was *Lee vs. Railway Co.*, 260 *U. S.* 653.

VIII

Plaintiff's last ground is that the action of the Cir-

cuit Court of Appeals for the Fifth Circuit on plaintiff's waiver-by-pleading insistence, was

(1) Contrary to the decisions of this court; and

(2) In conflict with the decision of the Circuit Court of Appeals of the Fourth Circuit in *Mankin vs. Bartley*, 266 Fed., 466 (which decision, by the way, is erroneously cited in plaintiff's brief as being in 255 Fed.)

It is thought that an examination of the apposite decisions of this court; and an examination of *Mankin vs. Bartley;* will show that plaintiff is wrong in both particulars.

We take them up in the order stated.

(1) Section 523 of Hemingway's Mississippi Code of 1917 (Sec. 537 of Hemingway's Mississippi Code of 1927) is already hereinbefore in this brief set out in our supplemental statement of the case. It will be noted by reference thereto, that the defendant is expressly authorized to plead at the same time to the jurisdiction of the Court and in abatement. The purpose of this statute is clear. If pleading in abatement at the same time with plea to the jurisdiction, pursuant to the leave given by the statute, should work the effect claimed by plaintiff, the statute would be entirely idle. Indeed, it seems to be conceded by plaintiff that if the cause were in the State Court the statute would prevent any waiver of the jurisdictional insistence, by the filing at the same time of the plea in abatement. The insistence is that the statute has no application to cases pending in the Federal Court. But this Court has ruled expressly otherwise.

> Sou. Pac. Ry. Co. vs. Denton, 146 U. S. at 208-209.
> Mex. Central Ry. Co. vs. Pinkney, 149 U. S. at 206.
> Roberts vs. Lewis, 144 U. S. 653, at 656-657.

Roberts vs. Lewis is an excellent illustration of the

principle involved; and in *Southern Pacific vs. Denton* appears a categorical denial of plaintiff's insistence, and an affirmation of the principles which governed the action of both the trial court and the Circuit Court of Appeals for the Fifth Circuit in the instant case. The statement referred to is in this language:

> "Under this Act (the Conformity Act) the Circuit Courts of the United States follow the practice of the Courts of the States in regard to the form and order of pleading, *including the manner in which objection may be taken to the jurisdiction and the question, whether objections to the jurisdiction and defences on the merits shall be pleaded successively or together.*" (Our emphasis.)
> Sou. Pacific Ry. Co. vs. Denton, 146 U. S. at 209.

Nothing is found in the cases from this court cited by plaintiff, which conflicts with the decisions hereinbefore cited or with the statement just quoted, or in any way impinges upon them. It would lengthen this brief unduly to analyze and discuss, case by case, the facts and holdings in the several decisions cited by the plaintiff. We think that the result may be summed up accurately thus:

In determining whether or not jurisdiction has been acquired *in the first instance*, the Federal Courts are not bound by the Conformity Act. But in considering the defendant's pleading and determining whether the mode of pleading constitutes a waiver of the right to set up lack of jurisdiction, the Federal Courts will look to the State statutes; and if the method of pleading does not constitute a waiver under the State statute, it will not constitute a waiver in the Federal Court. Of course no State statute can *confer* jurisdiction in the first instance on the Federal Court; but the practice statutes of the States will be followed "so far as may be" in determining

a question of waiver. The Conformity Act is not absolute in its terms and the State statutes are not peremptorily binding on the Federal Court — not "conclusive" — but they will be followed unless such following will manifestly do violence to a proper administration of justice. Plainly in determining whether or not there has been a waiver, no violence is done to the administration of justice, by following a State practice statute that authorizes the filing at the same time of pleas to the jurisdiction and pleas in abatement. The contrasting thoughts and distinction that we have attempted to express, appear clearly in *Sou. Pac. vs. Denton, supra*... They appear not only from the facts and the discussion by the Court but also are thrown into bold relief by immediate juxtaposition in the opinion at page 209 of 146 U. S.

(2) That there is no conflict between the decision of the Circuit Court of Appeals for the Fifth Circuit in the instant case, and the decision of the Circuit Court of Appeals for the Fourth Circuit in *Mankin vs. Bartley*, is thought to be demonstrable by examining the two cases.

In the instant case there has never been a general appearance by the defendant, unless such has been effected by the removal from the State to the Federal Court, (already hereinbefore discussed in an earlier division of this brief); or by the manner of pleading adopted pursuant to the Mississippi statute, now under discussion. What was held by both the courts below, was that no general appearance had been so effected; and that consequently there had been no waiver of the want of jurisdiction.

In *Mankin vs. Bartley*, there was a general, unqualified apearance. This is what happened: One Speed Mankin, (apparently a racing driver) at a Fair ran his automobile into and injured two persons on the race track. One of them was Bartley. Bartley sued Mankin.

Process was issued on March 26th, returnable to the third Monday in April, which was the 21st day of April. This process was served on the defendant on April 10th. On April 15th the defendant, by his counsel, *entered a general appearance.* It was in the form of a paper writing addressed by the counsel to the clerk of the court and was in the following language:

> "In the cases of James Bartley vs. Speed Mankin and G. C. Sanders vs. Speed Mankin, actions of trespass on the case, *please enter our appearances for the defendant* in each of these cases at first rules and give rule for defendant to plead." (Emphasis ours.)

Thereafter, on May 6th, defendant filed two pleas; one, a plea asserting defendant's personal exemption from suit on the ground that he was a citizen of West Virginia (the action was brought in Virginia); and the other, a plea of *lis pendens* of another action between the same parties upon the same cause of action, in the United States District Court for the Southern District of West Virginia.

The plaintiff made the point that the plea to the jurisdiction came too late because the defendant had already appeared and submitted his person to the jurisdiction of the court. There was a Virginia statute which authorized filing at the same time pleas in bar and pleas in abatement. It was under this statute that defendant had assumed to file his pleas. By some process of reasoning that does not appear from the opinion, the defendant sought to make the statute relate back so as not only to avoid any harm from pleading the two pleas together, but also to qualify what was a prior unqualified general appearance. Naturally and properly this effort was held futile. The holding is accurately stated in the first head note.

Not only does what we have stated appear unescapably from the statement of the case by the Court at the opening of the opinion (just hereinbefore summarized), but it further appears from the language of the opinion itself at page 468 of 266 Fed.:

> "It follows that, *by reason of the unrestricted appearance of the defendant at the 2nd April rules*, the plea setting up exemption from suit in this district filed at 1st May rules, was unavailing. The exemption, if it existed, had been irrevocably waived *by the antecedent appearance*."

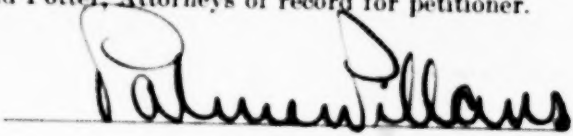
It still further appears by reference to a case in this court, referred to and followed by the Circuit Court of Appeals—*Interior Construction Co. vs. Gibney*, 160 U. S. 217. The holding of this Court in that case, as appears from the second head note, is that one who enters a general appearance in an action, thereby waives the right to raise any question of the jurisdiction of his person. This is such familiar and fundamental law that there can be no debate about it. The only question for debate in the instant case, as hereinbefore noted, is whether or not there has been effected a general appearance.

It is respectfully submitted that none of petitioner's grounds are well taken, and that its petition should be denied.

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of Counsel.

I, the undersigned Palmer Pillans, one of the attorneys of record for respondent, hereby certify that, on this 15th day of October, 1928, I have mailed, postage prepaid, three copies of this brief to Messrs. Green, Green and Potter, Attorneys of record for petitioner.



[illegible]

(24)

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1905.

No. 48.

ROBERT S. COMPANY, et al.,

Petitioners,

—against—

SKANDINAVIA INSURANCE COMPANY,

Respondent.

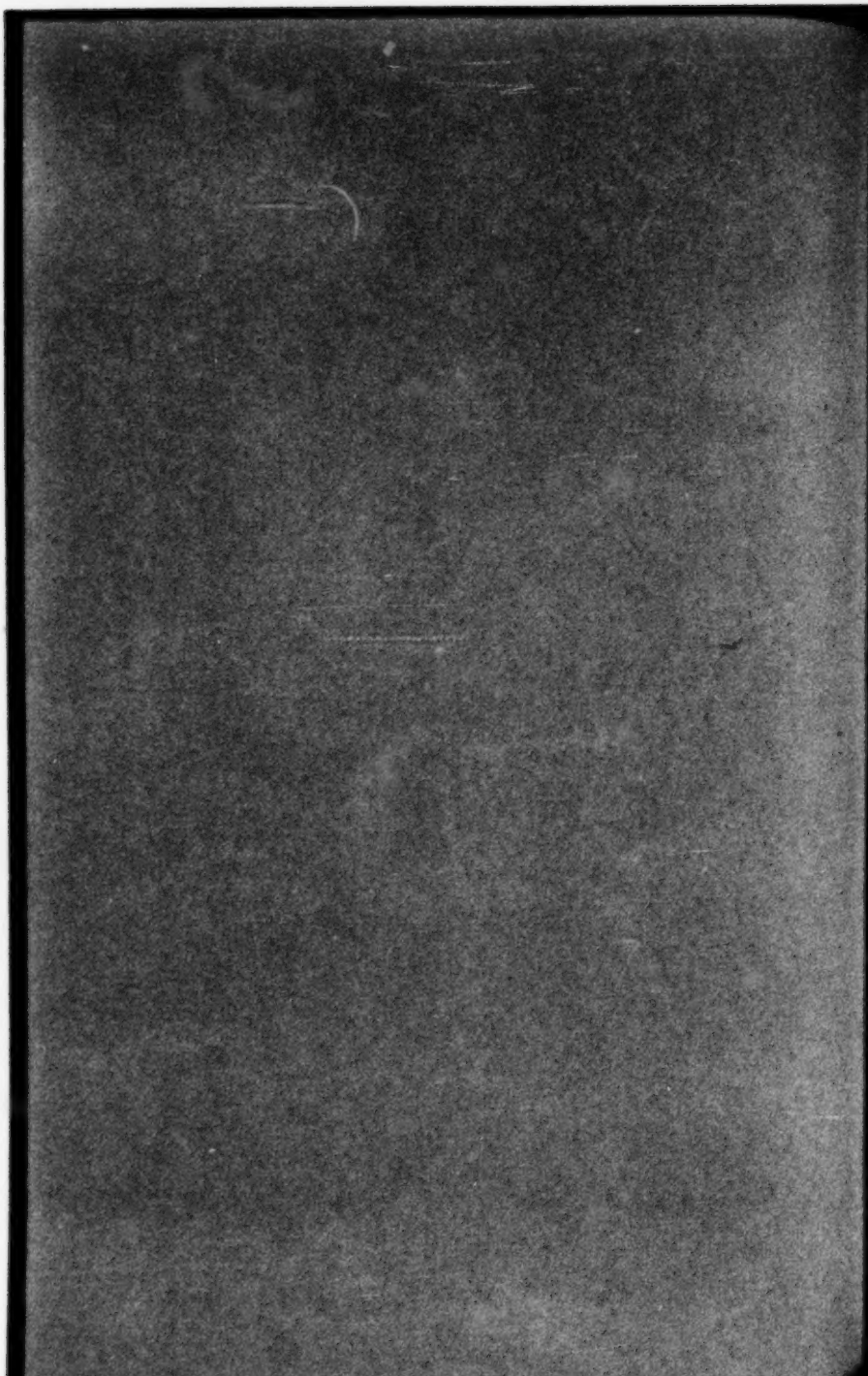
BRIEF FOR THE RESPONDENT.

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Supreme Court of the United States.

OCTOBER TERM, 1928.

No. 450.

MORRIS & COMPANY, *et al.*,

Petitioners,

—against—

SKANDINAVIA INSURANCE COMPANY,

Respondent.

BRIEF FOR THE RESPONDENT.

The petitioner has filed no brief except that submitted with the petition for a writ of certiorari and, therefore, this brief is drawn to meet the case as stated in the petition and accompanying brief. For convenience and in order to follow the same nomenclature as the petitioner, the parties are referred to as they appeared in the trial Court, where the petitioner was plaintiff and the respondent was defendant.

The opinion below is reported in 27 Fed. (2d) 329.

POINT I.

The defendant is not subject to suit in Mississippi because it neither did business in Mississippi nor consented to be sued therein by a non-resident in a cause of action not arising within that State.

It is common ground that

> "A foreign corporation is amenable to process to enforce a personal liability, in the absence of

consent, only if it is doing business within the State in such manner and to such extent as to warrant the inference that it is present there."

Philadelphia & Reading Ry. Co. v. *McKibbin*, 243 U. S. 264, 265.

(a) The defendant never did business within the State of Mississippi. This is a question of fact, and both of the lower Courts have concurred in so finding. The District Court said (Record, p. 184):

"Under the testimony, I do not think that the defendant has been doing business in Mississippi, consequently, the general Mississippi statute with reference to service on agents in transitory (actions) does not apply."

The Circuit Court of Appeals said (Record, p. 201):

"The record shows conclusively the following state of facts. Appellee does only a re-insurance business in the United States and all of this is transacted in New York City, the transactions being between appellee's agent and the original insurer. Appellee has re-insured risks on property situate in Mississippi and in compliance with the laws of Mississippi has appointed the Insurance Commissioner of Mississippi its agent for the purpose of service and has also appointed Wilkerson Inc. its nominal agent but that company has never had any transaction of re-insurance or otherwise for appellee, all business being negotiated and transacted in New York. Also in compliance with the Mississippi law appellee has filed annual statements of its re-insurance of risks on Mississippi property and paid an annual tax based thereon.

> We think it is clear appellee was not doing business in Mississippi so as to be subject to suit in that state on a cause of action arising elsewhere. *Old Wayne Life Assn.* v. *McDonough*, 204 U. S. 8; *Simon* v. *Southern Ry.*, 236 U. S. 115."

The findings of the lower Courts are clearly correct. The testimony is undisputed that all the contracts of reinsurance entered into by the defendant were made in New York (Record, p. 121) and were between the defendant and companies whose home offices were outside of the State of Mississippi (Record, p. 120).

The effect of a contract of reinsurance is to create an obligation between the reinsured and the reinsurer, and this obligation, being undertaken in New York, obviously does not constitute doing business in Mississippi. The contract of reinsurance does not create any privity between the reinsurer and the owner of the property originally insured.

33 Corpus Juris, 57, Sec. 735.

> "The ordinary contract of reinsurance operates solely between reinsured and the reinsurer, and creates no privity whatever between the reinsurer and the person originally insured. The contract of insurance and that of reinsurance remain totally distinct and unconnected, and the reinsurer is in no respect liable, either as surety or otherwise, to reinsured's policy-holders; and accordingly, they have no right of action against the reinsurer on the contract of reinsurance, nor any right of action against the reinsurer to reform the policy."

To similar effect is the decision of this Court in *Allemannia Insurance Co.* v. *Firemen's Insurance Co.*, 209 U. S.

326. The fact that the owner of the property may have been a resident of Mississippi is, therefore, immaterial, because the defendant made no contract with him.

Nor is it material that the defendant was entitled to write insurance in the State of Mississippi and may even have intended at some time to do business in Mississippi. The test is not whether the defendant "wished to keep open the possibility of doing business" in Mississippi, but whether, at the time process was served, it was, in fact, doing business in Mississippi.

Mitchell Furniture Co. v. *Selden Breck Co.*, 257 U. S. 213, at page 215.

The plaintiff repeatedly states in its brief that the defendant had made a deposit in the State of Mississippi as security for policy holders in the United States (Plaintiff's Petition and Brief, pp. 4, 9, 10, 20, 26). This is an error. The only deposit made by the defendant was the sum of $400,000, deposited with the New York Insurance Department (Record, p. 135). No deposit was made or required by the law of Mississippi to be made within that State.

The defendant paid no taxes in Mississippi; the taxes with respect to policies affecting property in Mississippi were paid by the direct writing companies (Record, p. 165).

There is nothing to the contrary in *State ex rel. European Accident Insurance Co.* v. *Tomlinson*, 129 N. E. 684. This was a mandamus proceeding by a foreign casualty company to compel the Superintendent of Insurance to license it to issue policies in Ohio. The Superintendent refused on the ground that the Ohio statute

required, as a condition of admission, an agreement that the admitted company would not reinsure certain classes of risks, either within or without the State. The case falls within the general rule that a state may attach such conditions as it pleases to the admission of a foreign company to do business within the State—at least where the company is not engaged in interstate commerce.

(b) Plaintiff cites no case to the effect that the state of facts found by the lower Court constitutes doing business, but apparently relies on the theory that the powers of attorney by which the defendant appointed the Insurance Commissioner of the State of Mississippi, its attorney upon whom process might be served and also appointed R. C. Wilkerson, its agent for the same purpose, constituted a consent to be served in this case even though the suit is by a non-resident of Mississippi and the cause of action arose outside the State. The rule on the point is stated by this Court as follows in *Mitchell Furniture Co.* v. *Selden Breck Co.*, 257 U. S. 213, at pages 215, 216:

> "The purpose in requiring the appointment of such an agent is primarily to secure local jurisdiction in respect of business transacted within the State. Of course when a foreign corporation appoints one as required by statute it takes the risk of the construction that will be put upon the statute and the scope of the agency by the State Court. *Pennsylvania Fire Insurance Co.* v. *Gold Issue Mining & Milling Co.*, 243 U. S. 93. But the reasons for a limited interpretation of a compulsory assent are hardly less strong when the assent is expressed by the appointment of an agent than when it is implied from going into business in the State without appointing one. In the latter case

> the implication is limited to business transacted within the State. *Simon* v. *Southern Ry. Co.*, 236 U. S. 115, 131, 132. *Old Wayne Mutual Life Association* v. *McDonough*, 204 U. S. 8, 22, 23. Unless the state law either expressly or by local construction gives to the appointment a larger scope, we should not construe it to extend to suits in respect of business transacted by the foreign corporation elsewhere, at least if begun, as this was, when the long previous appointment of the agent is the only ground for imputing to the defendant an even technical presence. *Chipman, Ltd.* v. *Thomas B. Jeffrey Co.*, 251 U. S. 373. The indications of the Ohio statutes, so far as they go, look to 'liability incurred within this State'. Gen. Code, Sec. 181. As we know of no decision to the contrary by the Supreme Court of Ohio, we are of opinion that the service upon Nash was bad."

To the same effect is the decision in *Missouri Pacific R. R. Co.* v. *Clarendon Co.*, 257 U. S. 533, at pages 535, 536.

See:

> *Maichok* v. *Bertha Consumers Co.*, 25 Fed. (2nd) 257,

where service was sustained solely because defendant was, in fact, doing business in Ohio.

The presumption, therefore, is that the designation of the agent is not intended to constitute a consent to a suit of the kind here involved, and the question is whether there is anything in the form of the designation or in the statutes and decisions of Mississippi to overthrow this presumption. The text of the designation of the Insur-

ance Commissioner appears at page 140 of the record and the text of the designation of R. C. Wilkerson appears at page 142 of the Record. They are both ordinary designations of an agent for the service of process and neither specifically refers to actions by a non-resident arising outside of the State of Mississippi. It may be noted that in the designation of the Insurance Commissioner, there is a provision:

> "this authority shall continue in force and irrevocable so long as any liability of the said Company remains outstanding in the said State of Mississippi, whether incurred before or since the making and execution of this instrument" (Record, p. 141).

If any inferences can be drawn from the form of the designation, this passage would suggest that the designation only applied to actions arising on liabilities outstanding in the State of Mississippi.

The language of the designations is no broader than the language in *Mitchell Furniture Co.* v. *Selden Breck Co.*, 257 U. S. 213. In that case the defendant had filed in Ohio a power of attorney providing:

> "We hereby appoint Simeon Nash of • • • as the person upon whom process may be served in all actions that may be brought against this company in any of the courts of the state, and designate his office at • • • as the principal office of the company in the State of Ohio." (Transcript of Record in this Court, No. 27685, p. 56.)

The issue, therefore, comes to this: whether, either by decisions or statute, the State of Mississippi has provided that the mere designation of an agent by a

foreign corporation constitutes a consent to be sued by a non-resident in a cause of action arising outside of the State and thus brings the case within the ruling of *Pennsylvania Fire Ins. Co.* v. *Gold Issue Mining & Milling Co.*, 243 U. S. 93. It is submitted that none of the cases or statutes cited by the plaintiff go this far. The cases cited by the plaintiff (Brief, pp. 21, 23) are the following:

> *N. O. J. & G. N. R. R. Co.* v. *Wallace*, 50 Miss. 244.

This was an action for personal injuries suffered in a wreck in Louisiana. The defendant appeared voluntarily, made no claim that the Court lacked jurisdiction of its person, but objected on the ground that the Court had no jurisdiction of the subject matter of the action because it occurred outside the State. The Court pointed out the distinction, saying, page 248:

> "* * * as there is no objection to the service of process by which the plaintiffs in error are brought into Court * * *."

And, page 249:

> "We need not stop to inquire whether an appearance could be compelled, for here, as far as we know, it was voluntary."

> *L. & N. R. R. Co.* v. *Pool*, 72 Miss. 487.

This was an action against a defendant that operated a railroad through Mississippi. No objection to the jurisdiction was raised. The point at issue was the applicability of the statute of limitations of Alabama, where

the cause of action arose, which, it was contended, was made applicable by Mississippi Code, Sec. 2754.

Northern R. R. Co. v. *Fortenberry*, 107 Miss. 79.

This was a suit against a *Mississippi* corporation and the question involved was the applicability of the statute of limitations of Louisiana, where the cause of action arose.

Pullman Co. v. *Lawrence*, 74 Miss. 782.

This was an action in tort by a citizen of Illinois against an Illinois corporation for an assault committed outside of Mississippi. Process was served on the Pullman car conductor in charge of a car operating in the State of Mississippi. The defendant did not deny that it was doing business within the State of Mississippi and made no objection to the validity of the service, nor was any question of the effect of designating a resident agent involved. The point raised by the defendant was that the Court should not take jurisdiction of the subject matter because the plaintiff was a non-resident and the action arose outside the State.

Vicksburg S. & P. R. Co. v. *Forcheimer*, 74 So. Rep. 418.

The defendant operated a railroad through Mississippi and concededly was doing business in Mississippi. No question of the effect of the designation of an agent was involved.

Fidelity and Casualty Co. v. *Cross*, 127 Miss. 31; 89 So. Rep. 780;

Great Southern Life Ins. Co. v. *Gomillion*, 110 So. Rep. 770.

These two cases involved certain code provisions of Mississippi requiring the clerk to mail copies of process to a foreign corporation in addition to the original service of process upon the Superintendent of Insurance or local agent. The facts are somewhat obscurely stated, but apparently both suits were brought by residents of Mississippi on policies of insurance issued in Mississippi. At least, no point was raised as to the effect of the designation of an agent in relation to a suit by a non-resident in a cause of action arising without the State.

> *Delta Insurance & Realty Co.* v. *Fourth Natl. Bank*, 111 So. Rep. 435.

In this case the defendant, a foreign corporation, did no business in Mississippi, but had employed an attorney in Mississippi to bring suit on some promissory notes. The case holds that service of process on such attorney in an independent suit was not sufficient.

> *Camden Fire Ins. Co.* v. *Delaney.* (This case is erroneously cited as being reported in 116 So. Rep. 743, and has not been found.)

The Mississippi statutes cited by the plaintiff (Brief, pp. 23-26) are Hemingway's Code, Sections 4088 and 4093. The first of these sections merely provides that foreign corporations may be sued in Mississippi as individual non-resident debtors may be sued. The second section provides that a foreign corporation

> "*found doing business in this state* shall be subject to suit here to the same extent that corporations of this state are, whether the cause of action accrued in this state or not * * *."

The statutes and decisions, therefore, come to this: In Mississippi the courts have jurisdiction of transitory actions by non-residents against foreign corporations, if such foreign corporations are doing business within the State of Mississippi or if they voluntarily appear in the action. There is no statutory statement or decision or dictum in the State Courts of Mississippi construing the appointment of an agent for the service of process as extending to suits in respect of business transacted by a foreign corporation elsewhere.

The law of Mississippi appears, in fact, to be substantially identical with the law of Ohio, which was before this Court in *Mitchell Furniture Co.* v. *Selden Breck Co.*, 257 U. S. 213. In that case it appeared that by the law of Ohio a foreign corporation could be sued in Ohio by a non-resident "no matter where the cause arose, if the subject matter be within the jurisdiction of the Court".

Handy v. *Insurance Co.*, 37 O. St. 366.

This case was called to the attention of this Court in the brief of the plaintiff-in-error (pp. 17, 18). There is nothing in the law of the State of Mississippi that goes further than the law of Ohio in the above case.

In this connection it should be noted that the cause of action in the present case arose May 23, 1919 (Petition for Certiorari, p. 5). The designation of a Mississippi agent by the defendant was made March 27, 1923, nearly four years after the cause of action accrued (Petition for Certiorari, p. 5; Record, pp. 141, 143). It is at least difficult to believe that the designation of an agent in Mississippi in 1923 should have any relation

to the issuance of a policy of insurance in Buenos Aires to a Louisiana corporation in 1918, covering a voyage to Havana.

The plaintiff seems to rely (Brief, p. 24) upon the underlined words in the following passage from the certificate of appointment of the Insurance Commissioner (Record, p. 141):

> "and this authority shall continue in force and irrevocable so long as any liability of the said company remains outstanding in the said State of Mississippi, whether incurred before or since the making and execution of this instrument."

If the underscored words have any materiality, they clearly apply only to liabilities in the State of Mississippi and not to the present suit.

POINT II.

The objection to the jurisdiction of the person of the defendant was not waived either by (A) removal or by (B) the plea filed.

(A) It is submitted that it is too well settled to require extended argument that the removal from a State Court to a Federal Court does not constitute a general appearance or waive the defendant's right to attack the jurisdiction of the person of the defendant,

> *General Investment Co.* v. *Lake Shore Ry.*, 260 U. S. 261, at pp. 268-9;
>
> *Cain* v. *Commercial Publishing Agency*, 232 U. S. 124 (a case from Mississippi),

even though no special reservation of such rights is made in the petition (*Wabash Ry. Co.* v. *Brow*, 164 U. S. 271; reaffirmed in the *Cain* case at p. 131).

The cases relied upon by the plaintiff (Brief, pp. 31-39) all relate to the right of a non-resident plaintiff to remand a removed case on the theory that the action could not have been originally brought in that particular district because neither plaintiff nor defendant was a resident of that district. This Court has held that the action of a defendant in removing an action brought by a citizen of the United States not residing in the district to which the case is removed, constitutes a waiver of the *venue* provision of the Act.

> *Lee* v. *C. & O. Railway*, 260 U. S. 653;
> *Seaboard Co.* v. *Chicago, etc., Ry. Co.*, 270 U. S. 363.

This is an entirely different question from that involved in the present controversy and certainly there is nothing in any of the cases cited to indicate an intention to overrule the *Cain* case.

(B) Plaintiff claims that the defendant entered a general appearance because in one plea the defendant

> "appears specially for the purpose of filing the pleas and motions hereinafter set out and for no other purpose,"

and pleaded

> I. "that the court is without jurisdiction of the person" (Record, p. 37).

and that

> II. "this defendant still appearing specially

> and solely for the purpose of asserting its rights as in these pleas and motions set out, says that if this Honorable Court should hold that jurisdiction of defendant's person has been obtained, then this defendant, not waiving its insistence but respectfully insisting, reiterating and reasserting that this Honorable Court is without jurisdiction of defendant's person; says that it ought not to be held in this action * * * because, it says, the said plaintiff heretofore * * * impleaded the said defendant in a personal action in Admiralty for the same cause * * *" (Record, p. 38).

In support of this argument, the plaintiff relies primarily upon *Mankin* v. *Bartley*, 266 Fed. 466, claiming that the present case creates a conflict between the Fifth and Fourth Circuits on the point (Petition for Certiorari, p. 5). The *Mankin* case was decided on the ground that prior to filing the pleas to the jurisdiction and in abatement, the defendant had entered a general appearance. The process in the case was returnable on the 2nd rules day of April, 1919. On that day counsel for the defendant wrote the Clerk as follows:

> "In the cases of *James Bradley* v. *Speed Mankin* and *G. C. Saunders* v. *Speed Mankin*, actions of trespass on the case, please enter our appearances for the defendant in each of these cases at first rules, and give rule for defendant to plead."

The plea to the jurisdiction was first filed on May 6th, the first May rules. The Circuit Court of Appeals quoted at length from the opinion of the District Court, whose conclusion was as follows (p. 468):

> "It follows that, by reason of the unrestricted

> appearance of the defendant at the 2nd April rules, the plea setting up exemption from suit in this district filed at 1st May rules was unavailing. The exemption, if it existed, had been irrevocably waived by the antecedent appearance. On this ground alone I am constrained to hold that the present motions must be overruled."

The Circuit Court of Appeals added:

> "We approve this construction of the law."

Furthermore, the objection to the jurisdiction in the case related, not to failure to serve process properly, but to the *venue* provision that suit could only be brought in the district of the residence of the plaintiff or defendant.

None of the other cases cited in the plaintiff's brief seem to us to have any bearing on the issue here involved.

It is believed that the plaintiff has confused two entirely separate matters. The question of Federal jurisdiction is a matter of Federal law not affected by the conformity act, but the form in which pleas to the jurisdiction may be made is a matter of practice within the conformity act. This Court pointed out the distinction in *Southern Pacific Company* v. *Denton*, 146 U. S. 202, at page 209, where the Court said:

> "Under this act (the conformity act), the Circuit Courts of the United States follow the practice of the courts of the State in regard to the form and order of pleading, including the manner in which objections may be taken to the jurisdiction, and the question whether objections to the jurisdiction and defences on the merits shall be pleaded successively or together."

In the present case the defendant appeared specially and moved to quash the attempted service of process and to dismiss the cause of action for want of jurisdiction over the person of the defendant (Record, pp. 35, 36). On the same day it also appeared specially to file the plea to the jurisdiction and the plea in abatement quoted above (Record, pp. 37-40). The trial Court consolidated the motion and pleas (Record, p. 68) and thereafter took testimony as to the question of jurisdiction and ultimately dismissed for want of jurisdiction (Record, p. 187). The motion to quash is apparently conceded by the plaintiff to be proper (Plaintiff's Brief, at the bottom of p. 46). The pleas were in accordance with the State practice. Sec. 537 of Hemingway's Mississippi Code, 1927, provides as follows:

> "The defendant may plead at the same time as many matters as he may have to the jurisdiction of the Court, to the disability of the plaintiff, and in abatement of the writ or declaration."

Both the lower Courts have held that this practice was proper and saved the defendant's rights.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 450.—October Term, 1928.

Morris & Company, et al., Petitioners, vs. Skandinavia Insurance Company.	Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[May 13, 1929.]

Mr. Justice Butler delivered the opinion of the Court.

In April, 1925, petitioner filed its declaration in the circuit court of Harris county, Mississippi, in an action to recover $50,000 from respondent, a Danish corporation, on an insurance policy. Thereupon the sheriff served a summons upon the state insurance commissioner, and the clerk of the court mailed a copy addressed to respondent at its home office in Copenhagen. There being diversity of citizenship, respondent removed the case to the United States district court for the Southern District of Mississippi, and filed a motion to quash and plea to the jurisdiction on the ground that respondent was not doing business in the State and had not authorized or consented to such service. Issue was joined, there was a trial at which much evidence was heard, the district court found for respondent, held the service invalid, sustained the plea and dismissed the case. The Circuit Court of Appeals affirmed. 27 F. (2d) 329.

Petitioner was incorporated under the laws of Louisiana and engaged in the business of packing and shipping meats in the United States and other countries. Respondent was incorporated in Denmark and engaged in the insurance business. Neither of the parties was a resident or citizen of Mississippi; and, as found by both courts, respondent was not doing business in that State. In 1918 at Buenos Aires, Argentina, respondent issued to petitioner the policy on which this action was brought. It covered a shipment of beef belonging to petitioner in a vessel at Montevideo, Uruguay, to be carried to Havana, Cuba. The declaration alleged a total loss and prayed judgment for the full amount of the policy.

In March, 1923, respondent, conformably to § 5864, Hemingway's Code, 1927, appointed the state insurance commissioner its attorney upon whom process might be served. The authorization states that service upon him shall be deemed to be valid personal service upon the company, and that such authority shall continue "so long as any liability of the company remains outstanding" in Mississippi, whether incurred before or after such appointment. And respondent, in accordance with the same section,* appointed a resident of the State for transaction of the business of reinsurance therein. It also annually reported such business and paid a license fee. §§ 5866, 5877, 5888. It made a deposit with an officer of the State of New York for the security of its policy holders in the United States and so complied with Mississippi law. § 5868.

Respondent's business in the United States was confined to reinsurance, and all such contracts were made in New York City. Some of the reinsured risks covered property in Mississippi, and that made the above mentioned appointments necessary in order to comply with the laws of the State. § 5865.

Reinsurance involves no transaction or privity between the reinsurer and those originally assured. The lower courts rightly held that the making of the reinsurance compacts in New York between respondent and insurers of property in Mississippi was not the doing of business in that State. And, as its consent to be sued there cannot be implied from any "transactions within the

*The provisions of § 5864 so far as material follow:

"No foreign insurance, indemnity or guaranty company shall be admitted and authorized to do business in this state until

. . .

"Third. It shall, by a duly executed instrument filed in his office, constitute and appoint the commissioner of insurance . . . its true and lawful attorney, upon whom all process in any action . . . against it may be served, and therein shall agree that any process against it which may be served upon its said attorney shall be of the same force and validity as if served on the company, and the authority thereof shall continue in force irrevocable so long as any liability of the company remains outstanding in this state. . . .

"Fourth. It shall appoint as its agent or agents in this state some resident or residents thereof other than the said commissioner, . . . authorizing the agent to acknowledge service of process for and on behalf of the company, and consenting that service of process on the agent shall be as valid as if served upon the company, according to the laws of this state, and waiving all claim of error by reason of such service."

State, there is no jurisdiction unless respondent's authorization in respect of service is broad enough to extend to this case. *Phila. & Reading Co.* v. *McKibbin*, 243 U. S. 264.

The policy sued on was issued and the loss occurred in South America. The importation of such controversies would not serve any interest of Mississippi. The purpose of state statutes requiring the appointment by foreign corporations of agents upon whom process may be served is primarily to subject them to the jurisdiction of local courts in controversies growing out of transactions within the State. *Old Wayne Life Ass'n* v. *McDonough*, 204 U. S. 8, 18, 21. *Simon* v. *Southern Railway*, 236 U. S. 115, 130. *Mitchell Furniture Co.* v. *Selden Breck Co.*, 257 U. S. 213, 215. *Louisville & Nashville R. R. Co.* v. *Chatters*, — U. S. —. The language of the appointment and of the statute under which it was made plainly implies that the scope of the agency is intended to be so limited. By the terms of both, the authority continues only so long as any liability of the company remains outstanding in Mississippi. No decision of the state supreme court supports the construction for which petitioner contends. And, in the absence of language compelling it, such a statute ought not to be construed to impose upon the courts of the State the duty, or to give them power, to take cases arising out of transactions so foreign to its interests. The service of the summons cannot be sustained.

Petitioner suggests that by removal of the case to the federal court, objection to jurisdiction over the person of respondent was waived. Our decisions are to the contrary. *General Investment Co.* v. *Lake Shore Ry.*, 260 U. S. 261, 268. *Lee* v. *Chesapeake & Ohio Ry.*, 260 U. S. 653. *Hassler* v. *Shaw*, 271 U. S. 195, 199. And petitioner asserts that, by joining its plea to the jurisdiction for lack of service with a plea in abatement because of another action pending, respondent appeared generally and submitted itself to the jurisdiction of the court. But the pleas were authorized by state practice which, under the Conformity Act, is adopted in the federal court. § 537, Hemingway's Code. U. S. C., Tit. 28, § 724. *Southern Pacific Co.* v. *Denton*, 146 U. S. 202, 209.

Judgment affirmed.